Last Updated November 4, 2016

CH. 57
WITNESSES

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§57-1
Obtaining and Calling Witnesses

§57-1(a)
Generally

Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) The right to call witnesses in one's behalf is essential to due process.

People v. McLaurin, 184 Ill.2d 58, 703 N.E.2d 11 (1998) A defendant is entitled to have a witness testify only if he makes at least some plausible showing of how the testimony would be both material and favorable to his defense. Evidence is material where it tends to raise a reasonable doubt of defendant's guilt, or in other words, where it is reasonably likely that it will affect the outcome of the case. Here, the testimony of six witnesses would have been favorable to the defense, but defendant made no plausible showing that their testimony would have affected the outcome of the case. Therefore, defendant failed to establish a violation of the right to compulsory process.

People v. Peter, 55 Ill.2d 443, 303 N.E.2d 398 (1973) A witness is not required to grant an interview to opposing counsel, but neither the prosecutor nor defense counsel should advise persons to refrain from discussing the case with opposing counsel. See also, **People v. Silverstein**, 60 Ill.2d 464, 328 N.E.2d 316 (1975).

People v. Segoviano, 189 Ill.2d 228, 725 N.E.2d 1275 (2000) Perjury committed by a State's witness did not require a mistrial over defense objection. The perjury was discovered during trial, "strong steps" were taken to correct it, the jury was "clearly, directly, and unequivocally instructed" to disregard the testimony, and the testimony of the correct witness was immediately presented. Also, the prosecutor did not refer to the false testimony in closing argument except to apologize for having unknowingly offered it, and the testimony was cumulative to other evidence.

People v. Kliner, 185 Ill.2d 81, 705 N.E.2d 850 (1998) Defendant was not entitled to disclosure of the new name, home address, place of employment and social security number of a witness who had been placed in a witness protection program. Although **Smith v. Illinois**, 390 U.S. 129 (1968) found that it was error to refuse to allow the defense to inquire about the real name and address of a State's witness who was both an informant and a participant in the offense, the court found that Smith does not apply to a mere witness. The court also noted that the State presented substantial evidence suggesting that the witness's safety was at issue.

People v. Puente, 125 Ill.App.3d 152, 465 N.E.2d 682 (1st Dist. 1984) The State's failure to call the victim as a witness or establish his unavailability did not violate defendant's right of confrontation. Defendant had no right to cross-examine the victim because he was not a witness against defendant at trial. Also, the State is not required to call every witness to a crime and had no duty to call the victim if it could meet its burden of proof without his testimony. Further, defendant could have called the victim as a witness.

People v. Dahlin, 184 Ill.App.3d 59, 539 N.E.2d 1293 (5th Dist. 1989) A defense witness testified at defendant's jury trial without being sworn. Defense counsel did not learn of this until after the close of the case. Reversal was not warranted because the defense should have objected to the witness not being sworn at the time of his testimony.

People v. Willis, 299 Ill.App.3d 1008, 702 N.E.2d 616 (1st Dist. 1998) A trial judge has discretion to allow testimony to be heard outside the courtroom. The trial judge did not err by having the jury transported to Cook County Hospital to hear the testimony of the victim of an attempt first degree murder. Also, it was not improper to allow a physician to testify at the hospital. The doctor's testimony was important to show the injuries of the witness who was testifying at the hospital, and the jury was already at the hospital to hear that testimony.

People v. Outlaw, 67 Ill.App.3d 327, 384 N.E.2d 898 (1st Dist. 1978) Trial court's ruling – that defendant could only present witnesses who could affirmatively testify that defendant was not the perpetrator and, thus, could not call several eyewitnesses who failed to identify defendant at a lineup and/or could not identify defendant as the perpetrator – erroneously excluded relevant evidence. "The testimony of those who observed the incident and were unable to identify the defendant reflects adversely on the credibility of the witnesses who made positive identifications," and was relevant.

People v. Beard, 67 Ill.App.2d 83, 214 N.E.2d 577 (1st Dist. 1966) Tendering witness statement to defense counsel in the presence of the jury is error. See also, People v. Lowe, 84 Ill.App.2d 435, 228 N.E.2d 563 (1st Dist. 1967).

Cumulative Digest Case Summaries **§57-1(a)**

People v. Bowman, 2012 IL App (1st) 102010 (No. 1-10-2010, 6/15/12)

The overwhelming majority of jurisdictions hold that an incarcerated witness, like an incarcerated defendant, should not be compelled to testify in prison clothing. Jurors may believe a defense witness associated with the accused is putatively guilty and view defendant as guilty by association. Absent unusual circumstances, no State interest is served by requiring the witness to testify in prison clothing. The American Bar Association also recommends that a witness not be compelled to testify in jail attire. ABA Standards for Criminal Justice: Discovery and Trial by Jury §15-3.2(b) (3d ed. 1996).

The Appellate Court agreed with this reasoning. Therefore, if a defendant makes a timely request that an incarcerated witness not testify in jail attire, the trial court should weigh the prejudicial effect against any security or other State interests. Because the trial court failed to undertake such an analysis in denying the defense request that its witness appear in civilian clothing, error occurred. However, the court found the error harmless beyond a reasonable doubt.

(Defendant was represented by Assistant Defender Christopher Kopacz, Chicago.)

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§57-1(b)
Compulsory Process

U.S. v. Nixon, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974) In order to require the issuance of subpoenas, the party must show that the material sought is evidentiary and relevant, not otherwise procurable, and necessary to prepare for trial, and that the application is made in good faith and is not a general "fishing expedition." See also, **People v. Lego**, 116 Ill.2d 323, 507 N.E.2d 800 (1987) (trial judge properly quashed defendant's 89 pretrial subpoenas where defendant "failed to show that the witnesses desired were material to his defense, and their testimonies relevant"); **People v. West**, 102 Ill.App.3d 50, 429 N.E.2d 599 (2d Dist. 1981) (trial court did not err in quashing two pretrial subpoenas served by defendant where the subpoenas

failed to meet the requirements Nixon).

U.S. v. Valenzuela-Bernal, 458 U.S. 858, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982) The pretrial deportation of illegal aliens who are witnesses to an alleged crime committed by a defendant is not a per se violation of the compulsory process clause of the Sixth Amendment or the due process clause of the Fifth Amendment. The government may be sanctioned for deporting such witnesses "only if the criminal defendant makes a plausible showing that the testimony of the deported witnesses would have been material and favorable to his defense, in ways not merely cumulative to the testimony of available witnesses." No such showing was made in this case.

People v. Watson, 36 Ill.2d 228, 221 N.E.2d 645 (1966) The right to summon witnesses is fundamental, and does not depend upon defendant's financial circumstances. Here, indigent defendant was entitled to a reasonable fee for the purposes of hiring a document examiner — the "issue of handwriting goes to the heart of the defense" of the forgery charge. See also, **People v. Nichols**, 70 Ill.App.3d 748, 388 N.E.2d 984 (5th Dist. 1979) (denial of funds for examination concerning defendant's sanity was reversible error).

People v. Virella, 55 Ill.2d 192, 302 N.E.2d 327 (1973) Sheriff's rule that non-indigent criminal defendants must pay fees in advance to obtain service of subpoenas did not violate the right to compulsory process.

In re Adams, 64 Ill.2d 269, 356 N.E.2d 55 (1976) Holding – that defendant was in direct contempt for failing to obey a summons issued pursuant to the Uniform Act to Secure the Attendance of Witnesses – was upheld where defendant was a "material and necessary" witness to certain New Jersey grand jury proceedings.

People v. McDonald, 322 Ill.App.3d 244, 749 N.E.2d 1066 (3d Dist. 2001) In deciding whether to exercise its discretion to issue a "material witness bond," the trial court should consider the materiality of the testimony, the diligence that would be required to produce the witness if no bond is issued, and the likelihood that the witness will conceal evidence or flee.

People v. Reynolds, 284 Ill.App.3d 611, 673 N.E.2d 720 (2d Dist. 1996) To obtain a subpoena for a judge, a party must seek leave of the court, show that the proposed testimony is not only relevant but also necessary, and establish that other efforts to secure the evidence have been unsuccessful.

People v. Paris, 295 Ill.App.3d 372, 692 N.E.2d 848 (4th Dist. 1998) Where prosecutors, judges, and (in certain circumstances) criminal defense attorneys and reporters are called to testify, the "special witness" doctrine may apply. Under this doctrine, the trial court should conduct a hearing to determine whether the subpoenas should stand. To obtain the testimony, the defense must make a plausible showing that the evidence is material and favorable by setting forth the testimony he expects to elicit, an explanation of its relevance and necessity, and the efforts made to secure the evidence through alternative means. Absent an abuse of discretion, a court of review will not overturn the trial court's decision to quash a subpoena under the "special witness doctrine." Here, the trial court did not abuse its discretion by quashing subpoenas for an assistant prosecutor and the attorneys for two witnesses. Although defense counsel expected the subpoenaed attorneys to testify that the State's witnesses reached deals with the State before they testified at defendant's trial, the prosecutor and one of the defense attorneys indicated that no firm arrangement had been reached with the witnesses and that no negotiations had taken place before defendant's trial. There was no basis for defendant to believe a deal had been reached. See also, **People v. Palacio**, 240 Ill.App.3d 1078, 607 N.E.2d 1375 (4th Dist. 1993) (it was error to subpoena a reporter (under special witness doctrine) who had quoted a prosecutor in an article where the defense could merely have asked the prosecutor to stipulate to the accuracy of the quotations).

People v. Willis, 349 Ill.App.3d 1, 811 N.E.2d 202 (1st Dist. 2004) 1. The court rejected the State's argument that the "special witness" doctrine applies only where the witness is subpoenaed by defendant, finding that to limit defendant's ability to call witnesses while imposing no similar restriction on the prosecution "unnecessarily and unfairly infringes" upon defendant's constitutional right to present witnesses.

2. The judge who presided in a previous trial of the same matter was a "special witness" when called by the prosecution to testify at a subsequent trial on the same charges. Although the judge did not preside over the trial in which he was called as a witness, the "special witness" doctrine may apply to persons (such as reporters) who do not participate in the trial at all. Also, the witness's only knowledge of the case resulted from presiding over the prior trial, and he testified only after reviewing the transcript of the first trial.

3. The trial judge erred by failing to conduct a formal preliminary hearing before allowing the presiding judge from the previous trial to testify and identify transcripts impeaching a witness who testified differently at the second trial, and the State failed to meet its burden under the "special witness" doctrine.

4. The erroneous admission of the judge's testimony was not harmless.

People v. Ullrich, 328 Ill.App.3d 811, 767 N.E.2d 411 (1st Dist. 2002) Statute permitting consideration of an officer's official report at a hearing on a motorist's petition to rescind summary suspension of driver's license for supposed refusal to submit to chemical testing comports with due process by making consideration of such evidence subject to the motorist's right to subpoena the officer. The motorist's waiver of his statutory right to subpoena the officer must be knowing, voluntary, and intentional.

People v. Rodriguez, 402 Ill.App.3d 932, 932 N.E.2d 113, 2010 WL 2675047 (1st Dist. 2010)

Pursuant to the special-witness doctrine, a party wishing to call a judge as a witness must: (1) specify the testimony sought to be elicited from the witness; (2) explain why the testimony is necessary and relevant; and (3) demonstrate that the evidence cannot be secured through other means.

The State did not meet its burden of demonstrating that the evidence it sought to elicit from the original sentencing judge was necessary, because the judge's testimony duplicated the report of the sentencing hearing. The error in admission of the sentencing judge's testimony was harmless because the transcript spoke for itself.

(Defendant was represented by Assistant Defender Rebecca Levy, Chicago.)

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§57-1(c)
Funding for Expert Witnesses

Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) An indigent defendant is entitled to a state paid psychiatrist where he shows that insanity will be a significant factor at trial or sentencing.

People v. Lawson, 163 Ill.2d 187, 644 N.E.2d 1172 (1994) Due process and the right to subpoena witnesses require that indigent defendants be given funding for expert witnesses where expert testimony is crucial to the case and defendant lacks sufficient means to present his case to the trier of fact; the assistance of an expert witness was necessary where the State's primary physical evidence consisted of finger and shoe prints and the State's expert testified that defendant had made some prints and could have made others. See also,

People v. Keene, 169 Ill.2d 1, 660 N.E.2d 901 (1995) (not error to deny motion for appointment of expert on issue that was not "crucial" to the defense); **People v. Dickerson**, 239 Ill.App.3d 951, 606 N.E.2d 762 (4th Dist. 1992) (trial court erred by refusing to appoint handwriting expert in forgery case; State's case would have been substantially weakened by expert opinion that defendant had not written the document).

People v. Glover, 49 Ill.2d 78, 273 N.E.2d 367 (1971) Trial court did not err by denying indigent defendant's request for funds to secure a court reporter to transcribe pretrial statements of witness; defendant made no showing of need or prejudice. There must be some showing that the funds are "necessary to prove a crucial issue in the case and that the lack of funds for the expert will therefore prejudice defendant." See also, **People v. Vines**, 43 Ill.App.3d 986, 358 N.E.2d 72 (4th Dist. 1976).

People v. Redd, 173 Ill.2d 1, 670 N.E.2d 583 (1996) Defendant forfeited his argument that the trial court should have appointed an investigator where, after the trial judge reserved ruling on the motion, defendant failed to call the court's attention to the outstanding request. Also, a motion that merely requested funds for an investigator, without explaining the function that the expert would perform, did not sufficiently advise the trial court that defendant was seeking assistance to develop mitigating evidence for the death hearing.

People v. Kinion, 97 Ill.2d 322, 454 N.E.2d 625 (1983) "[T]he judiciary possesses a limited power to exceed the $250 limit [for expert witnesses] set forth in the statute." The "best practice" is for counsel "to petition the trial court for any amount anticipated to be in excess of $250 before" spending it. The Court doubted "that fees in excess of $9,000, or more than 36 times the statutorily prescribed limit . . . were called for in this case . . . [and we] trust that the circuit court will take account of this and assess fees in a reasonable amount."

People v. Evans, 271 Ill.App.3d 495, 648 N.E.2d 964 (1st Dist. 1995) 1. Although 725 ILCS 5/113-3(d) purports to apply only in capital cases and only up to $250, courts have interpreted it to apply to the "reasonable" fees of "necessary" experts in non-capital felony cases. Thus, the State must pay the reasonable fees of expert witnesses whose opinions "go to the heart of the defense." Here, the trial court abused its discretion by refusing to pay the fees for expert testimony on the "battered woman syndrome" where the testimony would have been essential to a crucial issue at trial (defendant's state of mind at the time of the shooting).

2. Indigent defendant's guilty plea did not preclude her from recovering the expert witness fees; the statute does not require the expert to testify.

3. A defendant's failure to seek the trial court's authorization before retaining the expert does not justify an outright denial of all fees.

4. Although the trial court here could have denied payment for services it found to be duplicative or otherwise unreasonable, the fact that the trial court suspected that the hours had been exaggerated did not justify denying all reimbursement.

Cumulative Digest Case Summaries **§57-1(c)**

In re T.W., 402 Ill.App.3d 981, 932 N.E.2d 125 (1st Dist. 2010)

Because a defendant has the right to the effective assistance of counsel, courts must provide indigent defendants with the basic tools for an adequate defense. This includes funds for an expert where expert testimony is critical to a proper defense. Consistent with this rule, 725 ILCS 5/113-3(d) requires a court to provide an indigent defendant with funds for an expert where necessary to prove a critical issue, and defendant's inability to obtain an expert will prejudice his case.

Respondent was charged with sexual assault and abuse of a six-year-old boy. His identification as the offender was contested at trial. The complainant described the assailant as a six-foot tall man in his late 20's or early 30's who looked like a basketball player and had tattoos on his forearms and was unshaven. Respondent presented evidence that at the time of the offense, he was a minor who was five feet six inches tall, and had no tattoos or facial hair. The State presented evidence that DNA from a semen stain found on the complainant's clothing matched respondent's DNA. Defense counsel asked the circuit court to provide the defense funds for its own DNA expert. The court refused because respondent was not represented by court appointed counsel, even though it was conceded that respondent was indigent and that the expert was critical to the defense.

Based on a plain reading of §113-3(d), the Appellate Court concluded that it was irrelevant that counsel was not court-appointed as indigence and necessity were the only requirements for expert funds. Although it found these requirements satisfied, it concluded that the error was harmless. Nothing in the record suggested a reasonable probability exists that having a DNA expert to assist the defense would have changed the ultimate result of the proceeding.

(Defendant was represented by Assistant Defender Julianne Johnson, Chicago.)

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§57-1(d)
Witness's Invocation of Privilege Against Self-Incrimination

People v. Myers, 35 Ill.2d 311, 220 N.E.2d 297 (1966) Trial court properly prohibited the defense from calling as a witness someone who had refused to testify on self-incrimination grounds. See also, **People v. Cvetich**, 73 Ill.App.3d 580, 391 N.E.2d 1101 (2d Dist. 1979).

People v. Crawford Dist. Co., 78 Ill.2d 70, 397 N.E.2d 1362 (1979) Whether calling a witness with advanced knowledge that he or she will invoke the Fifth Amendment is error depends on the facts of each case, including the prosecutor's motive for calling the witness and the likelihood of the jury drawing unwarranted inferences against defendant from the witness's refusal to testify. Here, the prosecutor made no conscious or flagrant attempt to bolster his case as the result of the witness's invocation of the testimonial privilege — the prosecutor had previously obtained immunity for the witness and had every right to demand and to expect the witness to testify, under compulsion by the court if necessary. Also, one invocation of the privilege was not significant. See also, **People v. Harmon**, 194 Ill.App.3d 135, 550 N.E.2d 1140 (1st Dist. 1990); **People v. Pirrello**, 166 Ill.App.3d 614, 520 N.E.2d 399 (2d Dist. 1988) (reversible error occured where the State called and questioned a witness with knowledge that he would invoke his 5th amendment privilege).

People v. Peebles, 120 Ill.App.3d 376, 457 N.E.2d 1318 (1st Dist. 1983) The trial court properly struck a defense witness's direct examination testimony where the witness waived his Fifth Amendment right on direct examination but asserted his right on cross-examination. Because the witness was not subject to cross-examination due to his assertion of the privilege against self-incrimination, the direct examination testimony was untested and unreliable.

Cumulative Digest Case Summaries **§57-1(d)**

People v. Toney, 2011 IL App (1st) 090933 (No. 1-09-0933, 9/19/11)

Defendant's Sixth Amendment right to compulsory process does not include the right to compel a witness to waive his Fifth Amendment privilege. Under the Fifth Amendment, a witness in a criminal case may refuse to answer questions that might incriminate him when he has reasonable cause to believe he might subject himself to prosecution if he answers. The privilege extends not only to answers that would in themselves support a conviction, but also to answers that might furnish a link in a chain of evidence needed to prosecute the witness for a crime. Therefore, a witness may be denied the privilege only when it is perfectly clear, considering all of the circumstances, that the answer sought cannot possibly have a tendency to incriminate. The privilege must be liberally construed in favor of the potential witness. The trial court, not the witness, determines if, under the particular facts, there is a real danger of incrimination. The trial court's determination is reviewed for an abuse of discretion.

Defendant sought to question a witness about the circumstances of his altercation with the person whom defendant was charged with murdering, to support defendant's defense that the gun fired accidentally while he was protecting the witness from the deceased. The witness had given the defendant the gun used to kill the deceased. The defendant conceded that the court properly excused the witness from answering any questions about the gun. Defendant sought to have the witness testify concerning the specifics of his physical altercation with the deceased, which the witness initiated by punching the deceased in the face. Although the witness was not charged with any offense, he was interviewed by the police concerning his involvement in the death. The witness's answers to defendant's questions could provide an evidentiary link to his prosecution or might possibly have a tendency to incriminate him, even if the subject of the gun were avoided. Therefore, the trial court did not abuse its discretion in refusing to order the witness to testify.

(Defendant was represented by Assistant Defender Daniel Mallon, Chicago.)

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§57-1(e)
State's Interference With Defendant's Right to Present Witnesses

People v. Avery, 61 Ill.App.3d 327, 377 N.E.2d 1271 (1st Dist. 1978) The prosecutor committed reversible error by obstructing defendant's attempts to locate a witness.

People v. Mancilla, 250 Ill.App.3d 353, 620 N.E.2d 1163 (1st Dist. 1993) The State violated due process by exerting improper influence to prevent a potentially exculpatory witness from testifying for the defense by making repeated statements concerning a possible perjury prosecution and by referencing the witness's immigration status.

Two factors should be considered in determining whether a due process violation occurs in these circumstances: whether admonitions given at the State's behest caused the witness to refuse to testify, and whether the admonitions were in any way "improper."

Here, the prosecutor's actions caused the witness to refuse to testify because she feared that she might be deported. The perjury admonitions were also improper. The prosecutor's admonitions were "not given in a paternal manner," but were intended to intimidate the witness into not testifying. Further, the State's actions prejudiced defendant because no other witness could provide him with an alibi.

People v. Muschio, 278 Ill.App.3d 525, 663 N.E.2d 93 (1st Dist. 1996) The State violated defendant's right to present witnesses where it threatened to seek to increase a defense witness's sentence if he testified. "The State's intimidation of witnesses cannot be tolerated in our legal system." The error was not harmless because the absence of testimony meant that the State's evidence was uncontradicted. See also, **State v. Asher**, 18 Kan.App. 881, 861 P.2d 847 (Kan.Ct.App. 1993) (the prosecutor violated due process where it threatened

to end plea negotiations for a codefendant if he testified in defendant's behalf).

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§57-1(f)
Recalling a Witness

People v. Harris, 74 Ill.2d 472, 386 N.E.2d 60 (1979) It is within the sound discretion of the trial court to permit a witness to be recalled. See also, **People v. Mahon**, 77 Ill.App.3d 413, 395 N.E.2d 950 (1st Dist. 1979).

People v. Blue, 205 Ill.2d 1, 792 N.E.2d 1149 (2001) Although defendant could have arguably recalled the State's witness during his case-in-chief (after the trial court erroneously limited his cross-examination of the witness), recalling a witness is "inconvenient and insufficient" and may be devastating to the defense if the witness becomes unavailable. Further, because a witness's admission (in this case an admission of gang membership) at some later time is not as effective a challenge to credibility as the same admission "hot on the heels of the direct" testimony, the defense may simply "abandon the inquiry" if cross-examination is denied.

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§57-2
Exclusion of Witnesses

§57-2(a)
Testimony of a Witness Who Has Violated the Court's Exclusion Order

People v. Bridgeforth, 51 Ill.2d 52, 281 N.E.2d 617 (1972) It is within the trial court's sound discretion to allow testimony of a witness who has violated an order excluding witnesses. See **People v. Mack**, 25 Ill.2d 416, 185 N.E.2d 154 (1962) (the trial court has discretion to exclude witnesses; it is proper to allow one witness for the State, usually an arresting officer, to remain in the courtroom); **People v. Dixon**, 23 Ill.2d 136, 177 N.E.2d 206 (1961) (a motion to exclude witnesses should normally be allowed, and, if denied, the record should disclose a sound basis for the denial). The court's exercise of discretion will be upheld unless it appears that "the party offering the witness has been deprived of material testimony without his fault." See also, **People v. Fiorito**, 413 Ill. 123, 108 N.E.2d 455 (1952) (court's decision to allow State witness who violated exclusion order will not be reversed unless prejudice is shown). Here, the exclusion of a defense witness was upheld, in part, because there was no offer of proof as to what the testimony would be.

People v. Johnson, 47 Ill.App.3d 362, 362 N.E.2d 701 (5th Dist. 1977) Trial court committed reversible error, depriving defendant of material testimony, by refusing to allow the testimony of a defense witness who had been in the courtroom in violation of a witness exclusion order. The witness's testimony was probative because it concerned the crucial issue of identification, and neither defendant nor his counsel was responsible for the violation of the exclusion order. The court also discussed the rules and problems when a witness violates an exclusion order.

People v. Waller, 67 Ill.2d 381, 367 N.E.2d 1283 (1977) The defense forfeited its objection to the State's rebuttal testimony of a witness who had violated the trial court's exclusion order where the court reserved its ruling on the admissibility of evidence (after defendant objected) and defendant did not insist upon a

subsequent ruling.

Cumulative Digest Case Summaries **§57-2(a)**

People v. Bowens, 407 Ill.App.3d 1094, 943 N.E.2d 1249 (4th Dist. 2011)

Defense counsel waived the argument that the trial court erred by allowing the State's lead investigator to sit at the State's counsel table through the case, although the investigator testified after hearing the testimony of other witnesses. Counsel objected to the investigator's presence and filed a motion to exclude witnesses, but failed to raise the issue in the written post-trial motion.

(Defendant was represented by Assistant Defender Colleen Morgan, Springfield.)

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§57-2(b)
Testimony of a Witness Not Named in Discovery

People v. Ramshaw, 75 Ill.App.3d 123, 394 N.E.2d 21 (5th Dist. 1979) At a misdemeanor trial, the court erred by excluding a defense witness for defendant's failure to comply with discovery. Rule 415(g) does not apply in misdemeanor cases; also, exclusion was too drastic a sanction in this case.

People v. Gomez, 107 Ill.App.3d 378, 437 N.E.2d 797 (1st Dist. 1982) Trial court did not abuse its discretion in allowing a State rebuttal witness to testify though the State failed to name the witness in discovery. But see, **People v. Millan**, 47 Ill.App.3d 296, 361 N.E.2d 823 (1st Dist. 1977) (trial judge erred in allowing the State to call a co-defendant who was not on the State's list of witnesses).

In re Lane, 71 Ill.App.3d 576, 390 N.E.2d 82 (1st Dist. 1979) Trial court abused its discretion in excluding defense witness, who was listed as "Glay Phillips," but whose name the defense learned shortly before trial was "Glay Green," on grounds that her true name was not on the list of witnesses. (The woman used both names and told the defense her last name was "Phillips.") Exclusion was inappropriate as a means of dealing with a technical failure to disclose. The State could have been given a short continuance or recess to interview the witness. See also, **People v. Pozzi**, 42 Ill.App.3d 537, 356 N.E.2d 186 (2d Dist. 1976) (trial court abused its discretion by refusing to allow the testimony of a defense witness whose name was not on the pretrial witness list where the State had ample opportunity (24 hours) to ascertain the substance of the testimony, the defense learned that it would need the witness only after the court ruled favorably on a motion in limine, and the witness would have corroborated defendant's testimony concerning the drug transaction in question).

People v. Williams, 55 Ill.App.3d 752, 370 N.E.2d 1261 (1st Dist. 1977) Trial court abused its discretion by imposing the strictest sanction available under Supreme Court Rule 415(g), and thereby excluding all defense witnesses.

People v. Daniels, 75 Ill.App.3d 35, 393 N.E.2d 667 (1st Dist. 1979) On the last day of a murder trial, the defense sought to amend its list of witnesses to call a person who would testify that at the time of the incident, he was with a State's eyewitness who had claimed to be at the scene of the crime. The trial court abused its discretion by excluding the defense witness where the testimony was important, the extra time required for its presentation would not have resulted in "a significant hardship to the jury or a deterioration of the trial process," and defense counsel first learned of the testimony the previous day.

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§57-2(c)
Denial of Continuance Request to Call a Witness

People v. Wilson, 120 Ill.App.3d 950, 458 N.E.2d 1081 (1st Dist. 1983) Trial court abused its discretion by denying defense counsel's continuance requests to call certain doctors (to testify on the issue of insanity), rulings which precluded the defense from calling the witnesses. The issue of defendant's sanity was "closely contested," and the testimony defendant sought to present was material. Further, the court's reasons for denying defendant's requests (the case was one of the oldest on the court's call and the court wanted to dispose of the case before it went on vacation) did not outweigh defendant's interest in obtaining the testimony; although the case was one of the oldest on the docket, defendant had initially been found unfit and counsel had little more than five weeks to prepare for trial after defendant was found fit. Also, "it would appear that the trial court's determination of this matter may have been influenced in part by the court's concern with preventing a delay in its planned vacation."

People v. McClain, 343 Ill.App.3d 1122, 799 N.E.2d 322 (1st Dist. 2003) The trial court did not abuse its discretion in denying defendant's motion for a 24-hour continuance to locate a subpoenaed defense witness, who allegedly saw the offense and would have testified that defendant was not one of the offenders. A motion for continuance made more than 30 days after arraignment must be in writing and supported by affidavit, and the State must be given the opportunity to stipulate to the evidence. Because counsel made only an oral motion, the court would have acted within its discretion had it denied the motion for noncompliance with the procedural rules. Also, the court did not abuse its discretion by denying the motion on its merits, as counsel failed to show that the testimony might have affected the jury's verdict (the witness may have only seen part of the offense and simply failed to notice defendant and the witness's testimony conflicted with defendant's own statement).

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§57-2(d)
Other

People v. Blake, 179 Ill.App.3d 249, 534 N.E.2d 415 (1st Dist. 1989) The trial court did not abuse its discretion by refusing defense counsel's motion to withdraw and testify in defendant's behalf after a State witness denied making a certain statement to defense counsel. A trial court has broad discretion to refuse to permit attorneys from testifying. Here, counsel could have avoided the need to testify by interviewing the witness in the presence of others. Also, counsel's withdrawal after trial commenced would have imposed substantial hardship on defendant and wasted judicial resources.

Cumulative Digest Case Summaries **§57-2(d)**

People v. Bannister, ___ Ill.2d ___, ___ N.E.2d ___ (2009) (No. 105887, 10/29/09)

1. The credibility of a witness (a co-defendant) was not undermined to the extent that a fair trial was denied, although the witness's plea agreement with the State provided that in return for truthfully testifying against the defendant, two first degree murder convictions would be vacated so the witness could plead guilty to one first degree murder and be resentenced to 60 years in a medium security institution. Although the witness was required to testify consistently with his prior statements, the agreement specifically provided that it would be "null and void" if the co-defendant's representations concerning the defendant were found

to be false. It is not unreasonable to plea bargain for specific trial testimony that is consistent with information which the witness represents to be factually true, even if the benefit of the bargain is withheld until the witness has testified, so long as the "overriding requirement" of a plea agreement is that the testimony be truthful.

In dissent, Justices Freeman, Kilbride and Burke found that the majority had neglected to decide the issue raised by the defendant – whether due process is violated by a plea agreement which obligates a witness to testify consistently with prior statements.

2. Defendant did not have standing to challenge the validity of a plea agreement between the State and its witness. Absent due process concerns, the validity of a plea agreement is governed by contract law. Under contract law, there is a strong presumption that the agreement benefits only the parties who made it, and not a third party. Overcoming this presumption requires evidence manifesting an affirmative intent to benefit a third party.

Because the defendant was not an intended beneficiary of the plea agreement between the State and the co-defendant, he lacked standing to argue that the agreement was invalid.

Defendant's convictions and sentences were affirmed.

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§57-3
Competency of Witnesses

People v. Armstrong, 41 Ill.2d 390, 243 N.E.2d 825 (1969) A witness discovered as the result of an illegal search is not competent to testify. See also, **People v. Albea**, 2 Ill.2d 317, 118 N.E.2d 277 (1954). Compare, **U.S. v. Ceccolini**, 435 U.S. 268, 98 S.Ct. 1054, 55 L.Ed.2d 268 (1978); **People v. Bell**, 105 Ill.App.3d 208, 434 N.E.2d 33 (2d Dist. 1982).

People v. Gendron, 41 Ill.2d 351, 243 N.E.2d 208 (1968) Although the prosecutor is not incompetent to be a witness, there is a reluctance to permit an attorney to appear in a case as both an advocate and a witness. See also, **People v. Crump**, 5 Ill.2d 251, 125 N.E.2d 615 (1955); **People v. Janes**, 138 Ill.App.3d 558, 486 N.E.2d 317 (2d Dist. 1985); **People v. Blake**, 179 Ill.App.3d 249, 534 N.E.2d 415 (1st Dist. 1989).

People v. Lopez, 207 Ill.2d 449, 800 N.E.2d 1211 (2003) A trial court cannot order a complaining witness in a sex offense case to submit to a physical examination.

People v. Williams, 147 Ill.2d 173, 588 N.E.2d 983 (1991) Even where there is a challenge to the competency of a witness, due process does not require that the witness be examined by the opposing party at the competency hearing. Here, the medical records and testimony failed to establish that a State's witness was incompetent to testify. Although the witness had undergone hospitalization for an "acute schizophrenic reaction" immediately after the offenses, there was no connection between her past mental problems and her ability to give competent testimony, no showing that she suffered from any mental disability at the time of the trial, and no indication that she had been mentally disabled at the time of the offenses.

People v. Garcia, 97 Ill.2d 58, 454 N.E.2d 274 (1983) There is no rigid formula to determine a witness's competency, and the trial court's decision will not be reversed unless it abused its discretion. Here, the judge did not err in allowing an 11-year-old witness to testify, where the trial court was satisfied with the witness's answers to its inquiry regarding her age, name and location of school, grade level, and whether she knew the difference between telling the truth and a lie. See also, **People v. Ballinger**, 36 Ill.2d 620, 225 N.E.2d 10

(1967) (if a witness is sufficiently mature to receive correct impressions by his senses, recollect and narrate intelligently and appreciate the moral duty to tell the truth, he or she is competent to testify); **People v. Tappin**, 28 Ill.2d 95, 190 N.E.2d 806 (1963) (in determining a witness's competency, the witness's intelligence and understanding, rather than mere age, controls)**;** **People v. Seel**, 68 Ill.App.3d 996, 386 N.E.2d 370 (1st Dist. 1979) (in determining whether a witness is competent, the judge should consider four factors, including the witness's: (1) ability receive correct impressions from his senses, (2) the ability to recollect these impressions, (3) the ability to understand questions and express answers, and (4) the ability to appreciate the moral duty to tell the truth; here, the trial court conducted a proper examination and determined that the witness was competent despite her hearing and speech impediments, her weakness in English, and her unresponsive statements). See also, **People v. Luigs**, 96 Ill.App.3d 700, 421 N.E.2d 961 (5th Dist. 1981); People v. Diaz, 201 Ill.App.3d 830, 558 N.E.2d 1363 (1st Dist. 1990).

People v. Moretti, 6 Ill.2d 494, 129 N.E.2d 709 (1955) An objection to the competency of a witness should be made as soon as the witness is sworn. If the alleged incompetency is not known when the witness is sworn, the objection should be made as soon as it becomes apparent.

People v. Dixon, 22 Ill.2d 513, 177 N.E.2d 224 (1961) An incompetent, insane, or mentally ill person is competent to testify if he can understand an oath and has the power to observe, recollect, and communicate. See also, **People v. Brooks**, 39 Ill.App.3d 983, 350 N.E.2d 821 (4th Dist. 1976).

People v. Westpfahl, 295 Ill.App.3d 327, 692 N.E.2d 831 (3d Dist. 1998) 1. The presumption that competency hearings are required for witnesses under the age of 14 was abolished in 1989, when 725 ILCS 5/115-14 was amended to provide that all witnesses are presumed competent to testify. Under section 5/115-14(c), a competency hearing may not be initiated sua sponte by the trial judge, but only upon the request of the party raising a competency objection.

2. The trial judge erred by conducting a witness competency hearing while the jury was present; competency hearings are to be conducted outside the presence of the jury.

People v. Williams, 383 Ill.App.3d 596, 891 N.E.2d 904 (1st Dist. 2008) All witnesses are presumed competent to testify. Witnesses are incompetent if they are: (1) incapable of expressing themselves concerning the matter at hand so as to be understood, or (2) incapable of understanding the duty of a witness to tell the truth. The burden of proving that a witness is incompetent to testify falls upon the party challenging the witness's ability to testify. The question of competency to testify is determined by the trial judge, whose determination is not to be disturbed absent a clear abuse of discretion.

Here, a nine-year-old boy was competent to testify. A child is not required to give perfect answers to preliminary questions in order to be deemed a competent witness; after "prodding" by the prosecutor and the trial judge, the witness "displayed a threshold grasp of the difference between telling the truth and lying." See also, **People v. Epps**, 143 Ill.App.3d 636, 493 N.E.2d 378 (2d Dist. 1986) (six-year-old); **People v. McNichols**, 139 Ill.App.3d 947, 487 N.E.2d 1252 (5th Dist. 1986) (five-year-old); **People v. Diaz**, 201 Ill.App.3d 830, 558 N.E.2d 1363 (1st Dist. 1990) (eight-year-old); **People v. Ridgeway**, 194 Ill.App.3d 881, 551 N.E.2d 790 (4th Dist. 1990) (seven-year-old).

Also, defendant forfeited his challenge to the competency of an 11-year-old boy. Defendant failed to raise the issue in the trial court, and on appeal referred to the witness only tangentially when discussing the competency of the younger witness.

People v. Trail, 197 Ill.App.3d 742, 555 N.E.2d 68 (4th Dist. 1990) Judge's refusal to allow defendant's 12-year-old son to testify, on grounds of his age and "eagerness to testify," was erroneous. There was no suggestion of any kind that the witness was incompetent under the pertinent statute. Also, the court erred in barring the son's testimony to the extent that it engaged in weighing of that testimony and found it lacking.

It is not the trial court's role to evaluate witnesses and to permit the testimony of only those witnesses it finds credible.

People v. Mathis, 82 Ill.App.2d 173, 225 N.E.2d 808 (3d Dist. 1967) The fact that a witness made a pre-trial statement inconsistent with his trial testimony does not make the latter incompetent.

People v. Bates, 25 Ill.App.3d 748, 324 N.E.2d 88 (1st Dist. 1975) Trial court did not err in admitting the testimony of a person who had been "mistreated" by the police. The testimony was not the result of coercion and there was no indication the witness testified falsely.

People v. Makiel, 263 Ill.App.3d 54, 635 N.E.2d 941 (1st Dist. 1994) The trial court excluded testimony of 11-year-old psychiatric patient, on grounds that it was too remote or speculative to be relevant (apparently in reliance on the State's argument that the witness could be impeached with other witnesses' testimony). The trial court failed to conduct an adequate hearing the witness's competency. The court appeared to have excluded the evidence at least partially due to questions about the witness's competency, an issue it could not resolve without examining the witness and observing his demeanor while testifying.

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§57-4
Court and Hostile Witnesses

§57-4(a)
Court Witnesses

People v. Moriarity, 33 Ill.2d 606, 213 N.E.2d 516 (1966) The practice of calling a court's witness should be used sparingly. A proper foundation must include the reasons why the party desiring the witness cannot vouch for the witness's veracity and a showing that the witness's testimony will relate to direct issues and is necessary to prevent a miscarriage of justice. See also, **People v. Pastorino**, 91 Ill.2d 178, 435 N.E.2d 1144 (1982)**; People v. Garcia**, 97 Ill.2d 58, 454 N.E.2d 274 (1983) (the court did not err by failing to call the victim's wife as a court's witness and subject to impeachment by the testimony of defendant's investigator because the testimony related only to a collateral issue); **People v. Dennis**, 47 Ill.2d 120, 265 N.E.2d 385 (1970) (the State was properly allowed to have defendant's friend called as a court's witness).

People v. Collins, 25 Ill.2d 605, 186 N.E.2d 30 (1962) Whether to allow a witness to be called as a court's witness is within the trial court's discretion. The court does not abuse its discretion by refusing to call a court's witness until some hostility is shown. See also, **People v. Bridgeforth**, 51 Ill.2d 52, 281 N.E.2d 617 (1972).

People v. Weaver, 92 Ill.2d 545, 442 N.E.2d 255 (1982) A court's witness, or any witness for that matter, may not be impeached with a prior inconsistent statement unless his testimony has damaged, rather than failed to support, the impeaching party's position. (Effective April 1, 1982, Supreme Court Rule 238 was amended to specifically allow a party to impeach his own witness.) There is no reason to impeach a witness who has not contradicted any of the impeaching party's evidence, except to bring inadmissible hearsay to the jury's attention. **People v. Amato**, 128 Ill.App.3d 985, 471 N.E.2d 928 (3d Dist. 1984); **People v. Bolden**, 152 Ill.App.3d 631, 504 N.E.2d 835 (1st Dist. 1987) (damage is required, but surprise is not); **People v. Villegas**, 222 Ill.App.3d 546, 584 N.E.2d 248 (1st Dist. 1991) (the witness's testimony failed to damage the State's position where she was called as a witness and immediately asked about the impeaching statement).

People v. Chitwood, 36 Ill.App.3d 1017, 344 N.E.2d 611 (4th Dist. 1976) The court noted the distinction between a "court's witness" and a "hostile witness," and held that the State laid a sufficient foundation for having a certain person called as a court's witness (i.e., State could not vouch for veracity, testimony was necessary to prevent miscarriage of justice, and testimony went to direct issues). But, the State improperly impeached the court's witness with her prior statements that defendants had admitted guilt, because there was no justification for impeaching the witness on this point and the jury was not informed that the statement could not be considered as substantive evidence. Reversed and remanded.

People v. Kimbrough, 131 Ill.App.2d 36, 266 N.E.2d 431 (1st Dist. 1970) Trial court erred by calling witness as a court's witness; she was not an eyewitness, her relationship to the offense was not substantial, and it appeared that the prosecutor was attempting to place before the jury the witness's statement that defendant had admitted the crime.

People v. Lucas, 58 Ill.App.3d 541, 374 N.E.2d 884 (1st Dist. 1978) The trial court erred in permitting the State to call a witness as a court's witness and, after the witness denied any knowledge of the incident, "impeach" him with alleged prior statements implicating defendants. The unduly repetitious use of the prior statement (reading it page by page and repeating it during a police officer's testimony) and the prosecutor's attempt to add substantive weight to the statement in closing argument exceeded the bounds of legitimate impeachment, and constituted an improper use of the out-of-court statement as substantive evidence.

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§57-4(b)
Hostile Witnesses

People v. Tate, 87 Ill.2d 134, 429 N.E.2d 470 (1981) Under Supreme Court Rule 238, a hostile witness may be examined by the party calling him as if under cross-examination, and a hostile witness may be impeached by his prior convictions. See also, **People v. Soskins**, 128 Ill.App.3d 564, 470 N.E.2d 643 (2d Dist. 1984).

People v. Pittman, 55 Ill.2d 39, 302 N.E.2d 7 (1973) Trial court did not abuse its discretion in permitting a certain witness to be treated as a "hostile witness," where he was an occurrence witness and his initial testimony was evasive and hesitant.

People v. Williams, 62 Ill.App.3d 966, 379 N.E.2d 1268 (1st Dist. 1978) A hostile witness may be asked leading questions solely to refresh recollection, not for impeachment.

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§57-5
Defendant as Witness – Generally

McGauth v. California, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971) A defendant who testifies cannot claim the privilege against compelled self-incrimination to prevent cross-examination on matters reasonably related to the subject matter of the direct examination. See also, **People v. Williams**, 66 Ill.2d 478, 363 N.E.2d 801 (1977).

Brooks v. Tennessee, 406 U.S. 605, 92 S.Ct. 1981, 32 L.Ed.2d 358 (1972) State statute requiring a defendant who wanted to testify to do so before any other defense testimony was unconstitutional.

People v. Brocksmith, 162 Ill.2d 224, 642 N.E.2d 1230 (1994) Whether to testify (along with what plea to enter, whether waive a jury trial, and whether to appeal) is a decision that belongs exclusively to defendant. See also, **People v. Madej**, 177 Ill.2d 116, 685 N.E.2d 908 (1997).

People v. Smith, 176 Ill.2d 217, 680 N.E.2d 291 (1997) A defendant's waiver of his right to testify need not be made on the record. A conviction can be reversed on the ground that defendant was prevented from exercising his right to testify only if he contemporaneously asserted that right at trial. Where defendant never indicates that he wants to testify, the trial court is not required to independently advise him of that right, inquire whether he knowingly and intelligently waives it, or create a record of his decision.

People v. Patrick, 233 Ill.2d 62, 908 N.E.2d 1 (2009) The trial court's failure to rule on a motion *in limine* on the admissibility of defendant's prior convictions when it has sufficient information to make a ruling constitutes an abuse of discretion. (There may be rare cases when a trial court cannot effectively conduct a **Montgomery** balancing test without hearing defendant's testimony.) In Patrick's case, the trial court's refusal to rule on the motion *in limine* on the admissibility of defendant's prior convictions until after defendant testified was not harmless beyond a reasonable doubt. As to Phillips' case, Phillips forfeited review of the issue by not testifying. See also, **People v. Cooper**, 66 Ill.App.3d 205, 383 N.E.2d 768 (5th Dist. 1978) (it was fundamentally unfair for the court to allow the State to impeach defendant with a prior conviction where defendant took the stand after the court's initial ruling to exclude the evidence; the State failed to demonstrate conclusively that the court's ruling did not induce defendant to testify).

People v. Burris, 49 Ill.2d 98, 273 N.E.2d 605 (1971) When a defendant offers himself as a witness he is subject to legitimate cross-examination. See also **People v. Figueroa**, 308 Ill.App.3d 93, 719 N.E.2d 108 (1st Dist. 1999) (the trial court did not abuse its discretion in striking defendant's testimony when he refused, on cross-examination, to answer a question about his drug source); **People v. Doss**, 26 Ill.App.3d 1, 324 N.E.2d 210 (2d Dist. 1975) (when a defendant testifies generally as to what happened in a specified period or his movements on a specified day, he cannot refuse to answer as to all that occurred within the period of time covered by his testimony).

People v. Lindsey, 199 Ill.2d 460, 771 N.E.2d 386 (2002) Neither the Illinois constitutional right against self-incrimination nor due process is violated where the State calls a probationer as a witness at the hearing on a petition to revoke his probation.

People v. Harris, 8 Ill.2d 431, 134 N.E.2d 315 (1956) When it is material to an issue (such as self-defense), a defendant should be allowed to testify about his intent, motive, or belief. See also, **People v. Pernall**, 72 Ill.App.3d 664, 391 N.E.2d 85 (1st Dist. 1979) (in self-defense case, the court erred by barring defendant from testifying about his intent and beliefs at the time he shot the deceased); **People v. Graves**, 61 Ill.App.3d 732, 378 N.E.2d 293 (1st Dist. 1978) (self-defense); **People v. Moore**, 27 Ill.App.3d 337, 326 N.E.2d 420 (1st Dist. 1975) (self-defense).

People v. Easley, 148 Ill.2d 281, 592 N.E.2d 1036 (1992) Where the trial court ruled that defendant's pretrial statements were obtained in violation of the Fifth and Sixth Amendments but could be used as impeachment, defendant was not required to testify in order to preserve his argument that the statement should not have been permitted as impeachment.

People v. Bennett, 257 Ill.App.3d 299, 629 N.E.2d 116 (1st Dist. 1993) The plain language of Ch. 38, ¶311 (725 ILCS 185/11) bars impeachment of a defendant's trial testimony with statements he made at the pretrial services interview.

Ward v. Sternes, 334 F.3d 696 (7th Cir. 2003) The Illinois Appellate Court committed unreasonable error in finding that defendant (who suffered from severe brain damage and was fit to stand trial only with the use of psychotropic drugs) knowingly and intelligently waived his right to testify based on his statement, "I guess. I don't know," which defendant made in response to the trial court's inquiry into whether defendant agreed with defense counsel's decision that defendant not testify. Interpreting defendant's statement as a knowing and intelligent waiver was unreasonable where it was clear that defendant had little understanding of the implications of the decision and, in view of defendant's mental limitations, more than an equivocal statement was required.

Cumulative Digest Case Summaries **§57-5**

People v. Mullins, 242 Ill.2d 1, 949 N.E.2d 611 (2011)

1. Under **People v. Montgomery**, 47 Ill.2d 510, 268 N.E.2d 695 (1971), a witness can be impeached with a prior conviction if the crime was punishable by death or imprisonment in excess of one year or involved dishonesty or false statement regardless of the punishment, unless the judge determines that the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice. Evidence is not admissible under this rule if more than 10 years have elapsed since the date of conviction or the release of the witness from confinement, whichever is later.

Several factors are relevant to balancing probative value and prejudicial effect, including the nature of the prior conviction, the nearness or remoteness of the conviction to the present charge, the subsequent career of the defendant, the length of the witness's criminal record, and whether the crime was similar to the one charged. The mere fact that a prior conviction is for the offense charged does not necessarily mean that its admission is error, especially when the jury is instructed concerning the limited use it may make of the prior conviction.

Here, the trial court did not err by admitting one of defendant's three prior convictions for possession of a controlled substance with intent to deliver, the same offense for which he was on trial. The trial court clearly performed the required balancing test although it failed to explicitly state it was doing so; the parties explicitly argued that the probative value of the three prior convictions was outweighed by their prejudice, the trial court asked the parties for precedent concerning the admission of crimes identical to the charge, and the court admitted only the most recent conviction.

2. Under **People v. Patrick**, 233 Ill.2d 62, 908 N.E.2d 1 (2009), it is error for the trial court to delay ruling on a motion *in limine* to exclude the defendant's prior convictions as impeachment, unless there is insufficient information to make a ruling before the defendant testifies. Under **Patrick** and **People v. Averett**, 237 Ill.2d 1, 927 N.E.2d 1191 (2010), such error can be harmless only if the State can show beyond a reasonable doubt that it did not affect the outcome of the proceeding. **Patrick** error is not "structural error," which requires reversal without application of the harmless error test.

One factor in determining whether **Patrick** error is harmless beyond a reasonable doubt is whether the defendant needs to testify in order to present a defense. Here, there were significant gaps in defendant's theory which could only be filled by his testimony. In other words, only defendant could have provided information about his actions between the times he was seen by other defense witnesses, and only he could explain his possession of currency in denominations different from those which his own witness claimed. In addition, there were no other occurrence witnesses for the defense.

However, other factors are to be considered in determining prejudice besides the defendant's need to testify. The court noted that the State did not argue that defendant's prior conviction meant that he had a propensity to commit the crime charged or that he was unbelievable simply because he had a prior conviction. Furthermore, the State's evidence was strong and consisted of the unimpeached testimony of three officers who observed defendant making controlled substance sales and who arrested defendant in

possession of currency in denominations appropriate to the sales. Defendant admitted he was standing in the location the officers identified, and attempted to explain his presence "by linking together a long series of improbable coincidences and contradictory statements, while also leaving substantial gaps in his theory of the case." Furthermore, portions of defendant's testimony were contradicted by defense witnesses. In view of all of these factors, any error in delaying the ruling on the motion *in limine* was harmless beyond a reasonable doubt.

3. The court rejected the argument that the delay was prejudicial because during deliberations, the jurors asked for a copy of the stipulation regarding the prior conviction. The court concluded that it would be speculative to conclude that the request meant the jury relied on the prior conviction in deciding to convict in this case.

4. The court's opinion was written by Justice Freeman and joined by one justice (J. Burke). Two special concurring opinions disagreed on the role to be played by the need for defendant's testimony in determining whether the error was harmless.

Chief Justice Kilbride noted that he had written **People v. Patrick**, which he believed to hold that withholding a ruling on a motion *in limine* is more prejudicial where defendant's testimony is not necessarily required to present a defense, because the defendant is deprived of the opportunity to make an informed decision. By contrast, Justice Garman (joined by Justices Thomas, Karmeier and Theis), believed that a defendant who must testify if he is to have any chance of having the jury accept his version of events suffers greater prejudice if a ruling on his motion to exclude the convictions is delayed, because he is harmed if he does not testify, if he testifies and discloses the prior conviction without knowing what ruling the trial judge would have made, or if he testifies without disclosing the conviction and the trial court elects to admit it.

Defendant's conviction for possession of a controlled substance with intent to deliver was affirmed.

(Defendant was represented by Assistant Defender Jessica Arizo, Chicago.)

In re Joshua B., 406 Ill.App.3d 513, 941 N.E.2d 1032 (1st Dist. 2011)

A criminal defendant has the right to testify in his own defense and the ultimate decision of whether to testify is the defendant's. That right may be waived, but no specific type of waiver need be executed. A conviction cannot be reversed on appeal on the ground that the defendant was denied his right to testify unless he contemporaneously asserted that right by informing the trial court that he wished to testify.

The trial court has no duty to advise a defendant of his right to testify or not testify when he is represented by counsel. Rather, it is counsel's responsibility to advise a defendant of his right to testify and to explain the advantages and disadvantages of invoking that right. Three concerns underlie that rule. First, by advising a defendant of his right to testify as the trial unfolds, a court could influence a defendant to waive his right not to testify, thus threatening the exercise of this other, converse, constitutionally-explicit, and more fragile right. Second, a court could intrude upon the attorney-client relationship, frustrating a strategic decision made by defendant and defense counsel. Third, it is difficult for a judge to determine the appropriate time to advise a defendant of his right to testify. The judge cannot know that the defendant has not testified until the defense rests. Such a moment is not an opportune time to engage in a discussion with defendant that might lead to a rupture with defense counsel or undo a trial strategy based on the defendant's not testifying.

Therefore no error occurred where the court did not advise a minor respondent in a delinquency proceeding that he had a right to testify, or verify that he knowingly and voluntarily waived that right.

(Defendant was represented by Assistant Defender Brian Carroll, Chicago.)

People v. Burgess, 2015 IL App (1st) 130657 (No. 1-13-0657, 8/14/15)

1. It is generally improper for a prosecutor to ask a defendant to comment on the veracity of other witnesses. But a prosecutor may ask such questions if they require the defendant to explain his story in light of overwhelming conflicting evidence.

Here there was overwhelming evidence conflicting with defendant's version of events. It was therefore proper for the prosecutor to ask defendant if he had heard the testimony of three prosecution

witnesses and why his version of events differed so crucially from that testimony.

2. Before a witness can be impeached with a prior inconsistent statement, counsel must lay a proper foundation by presenting the place, circumstances and substance of the prior statement to the witness and giving him an opportunity to explain the inconsistency. The purpose of this rule is to avoid unfair surprise.

Defendant wanted to impeach a witness with the testimony of the witness' uncle that he had heard the witness tell his father he did not want to lie anymore. While cross-examining the witness, defense counsel asked whether the witness had engaged in any conversations with his father in front of his uncle. The witness denied any such conversations. Defense counsel did not ask the witness about any specific conversation.

Later, when defense counsel tried to ask the uncle about the alleged conversation between the witness and his father, the trial court sustained the State's objection on the basis that counsel had failed to lay a proper foundation to impeach the witness.

The Appellate Court upheld the trial court's ruling. The court rejected defendant's argument that he had laid a proper foundation by asking the witness whether he had any conversations with his father in front of the uncle. This question did not provide the witness any notice about the substance of the uncle's proposed testimony and hence did not eliminate the element of unfair surprise.

(Defendant was represented by former Assistant Defender Jim Morrissey and Assistant Defender Yasaman Navai, Chicago.)

People v. Cleveland, 2012 IL App (1st) 101631 (No. 1-10-1631, 11/30/12)

A defendant has a constitutional right to testify and only he can waive that right. It is incumbent on the defendant to assert his right to testify such that it can be vindicated during the course of the trial.

When defense counsel announced that the defense was resting, defendant informed his counsel that he wished to testify. Counsel responded, "Not now, I'm the attorney, be patient." Defendant did not inform the court that he wanted to testify or that his counsel refused to permit him to testify. Defendant's silence amounted to acquiescence in counsel's decision to rest without calling defendant as a witness. Defendant's claim that he was unaware that he could address the court was discounted because defendant had addressed the court at sentencing.

(Defendant was represented by Assistant Defender Rachel Moran, Chicago.)

People v. Lampley, 405 Ill.App.3d 1, 939 N.E.2d 525 (1st Dist. 2010)

Under **People v. Patrick**, 233 Ill.2d 62, 908 N.E.2d 1 (2009), the trial judge errs by failing to make a pretrial ruling on a motion *in limine* concerning the admissibility of prior convictions as impeachment, at least where the court has sufficient information to make a ruling before trial. In **Patrick**, the trial judge followed a blanket policy of refusing to rule on the admissibility of prior convictions until after the defendant testified.

The Appellate Court found that no abuse of discretion occurred where the trial court did not follow a blanket policy, the parties did not "develop arguments" concerning the information before the trial judge when the motion *in limine* was filed, and the judge issued a ruling at the close of the State's case, before defendant was required to decide whether to testify. The court acknowledged, however, that the preferred practice is to either: (1) rule on the admissibility of prior convictions before trial, or (2) make a record of the compelling facts which necessitate deferral of the ruling.

In the alternative, because the defendant had the benefit of the ruling when deciding whether to testify, any error was not so serious as to constitute plain error under the second prong of the plain error test.

(Defendant was represented by Assistant Defender Jessica Arizo, Chicago.)

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§57-6

Examination of Witnesses

§57-6(a)
Refreshing a Witness's Recollection; Leading Questions; Narrative Testimony; Rehabilitating a Witness

People v. Griswold, 405 Ill. 533, 92 N.E.2d 91 (1950) A witness may only testify to facts within his knowledge and recollection, but is allowed to refresh and assist his memory by the use of a written instrument, memorandum, or entry in a book, whether or not the writing was made by the witness. See also, **People v. Enis**, 139 Ill.2d 264, 564 N.E.2d 1155 (1990).

People v. Shatner, 174 Ill.2d 134, 673 N.E.2d 258 (1996) A witness's memory can be refreshed only after it has been established that she has no memory concerning the facts in question. Thus, if a witness testifies that her memory is exhausted, a written memorandum may be used to refresh and assist the testimony, whether the memorandum was written by the witness or another person.

People v. Scott, 29 Ill.2d 97, 193 N.E.2d 814 (1963) Refreshing material referred to by witness must be shown to opposing counsel.

People v. Schladweiler, 315 Ill. 553, 146 N.E.2d 525 (1925) The test of whether a question is leading is whether it suggests the words or thought of the answer. See also, **People v. Cross**, 40 Ill.2d 85, 237 N.E.2d 437 (1968) (objection to leading question properly sustained).

People v. Server, 148 Ill.App.3d 888, 499 N.E.2d 1019 (4th Dist. 1986) The trial judge has discretion to allow leading questions to a child of tender years (here, nine years old). See also, **People v. Luigs**, 96 Ill.App.3d 700, 421 N.E.2d 961 (5th Dist. 1981) (12-year-old); **People v. Ridgeway**, 194 Ill.App.3d 881, 551 N.E.2d 790 (4th Dist. 1990) (seven and nine-year-olds).

People v. Taylor, 132 Ill.App.2d 473, 270 N.E.2d 628 (1st Dist. 1971) The use of leading questions will not cause reversal of a conviction unless the trial court abused its discretion and caused substantial injury to defendant.

People v. Dickman, 117 Ill.App.2d 436, 253 N.E.2d 546 (2d Dist. 1969) Normally, evidence is introduced by question and specific answer. This method tends to keep the testimony within the rules of evidence and affords greater opportunity for opposing counsel to object to inadmissible testimony before it is given. The trial judge, however, has discretion to permit the narrative form of testimony, particularly if it is best suited to the characteristics of a particular witness.

People v. Diaz, 78 Ill.App.3d 277, 397 N.E.2d 148 (1st Dist. 1979) The trial court erred by refusing to allow defendant to attempt to rehabilitate a witness. The witness, a co-defendant who had pleaded guilty to the offense, was asked by the State on cross-examination whether at his plea he had agreed that defendant was involved. The defense sought to rehabilitate the witness by showing that he did not agree that defendant was involved, but had only agreed that State witnesses would testify that defendant was involved. Reversed and remanded.

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§57-6(b)
Cross-Examination

§57-6(b)(1)
General Principles Regarding the Right to Confrontation

Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) Due process requires a fair opportunity to defend against State accusations; thus, any limitations on rights to confront and cross-examine witnesses require close examination.

Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed. 2d 177 (2004) The Confrontation Clause bars the admission of an unavailable witness's testimonial hearsay statement if defendant lacks the opportunity to cross-examine the declarant. (**Crawford** overruled precedent holding that an unavailable witness's hearsay statement is admissible so long as the statement has adequate indicia of reliability, i.e., it falls within a firmly rooted hearsay exception or bears particularized guarantees of trustworthiness.) See also**,** **People v. Stechly**, 225 Ill.2d 246, 870 N.E.2d 333 (2007) (the admission of an unavailable witness's testimonial hearsay was prejudicial error)**;** **In re T.T.**, 384 Ill.App.3d 147, 892 N.E.2d 1163 (1st Dist. 2008) (child witness was unavailable, although she answered preliminary questions about her address, school, and family members, because she refused to testify about the incident (except to say that respondent had unbuttoned her pajamas); because the unavailable witness's out-of-court statements were testimonial and respondent did not have an opportunity for cross-examination, they were inadmissible under **Crawford**).

U.S. v. Owens, 484 U.S. 554, 108 S.Ct. 838, 98 L.Ed.2d 951 (1988) The right of confrontation guarantees only the opportunity for effective cross-examination, not successful cross-examination. This requirement was satisfied, though the victim was unable to remember the basis of his out-of-court identification of defendant and did not remember seeing defendant during the attack, for the victim testified that he remembered identifying defendant as his assailant while he was hospitalized from the injuries. Defendant had the opportunity to bring out the witness's bad memory and other facts tending to discredit his testimony. See also, **Delaware v. Fensterer**, 474 U.S. 15, 106 S.Ct. 292, 88 L.Ed.2d 15 (1985) (defendant's right to confront witnesses was not violated where a State expert voiced his opinion that certain hair had been forcibly removed, but was unable to recall the basis for that opinion; the Court discussed two types of confrontation clause cases (i.e., involving the admission of out-of-court statements and restrictions imposed by law or the trial court), but did not decide "whether there are circumstances in which a witness' lapse of memory may so frustrate any opportunity for cross-examination that admission of the witness' direct testimony violates the Confrontation Clause"); **People v. Helton**, 195 Ill.App.3d 410, 552 N.E.2d 398 (4th Dist. 1990) ("a gap in a witness' memory concerning the content of a prior statement does not necessarily preclude an opportunity for effective cross-examination"; here, the State was allowed to introduce the victim's prior statement though at trial she could not recall certain details of the statement).

People v. Campbell, 208 Ill.2d 203, 802 N.E.2d 1205 (2003) Defense counsel may legitimately waive his client's right to confrontation by stipulating to the admission of evidence - at least where defendant does not object - if the decision to stipulate is a matter of legitimate trial tactics. But, where the stipulation includes the statement that the evidence is sufficient to convict, or the stipulation is the State's entire proof and defendant does not preserve an issue for appeal, defendant must personally waive the right to confrontation. See also, **People v. Phillips**, 217 Ill.2d 270, 840 N.E.2d 1194 (2005) (the court was not required to admonish defendant of the implications of stipulating to evidence contained in laboratory reports regarding testimony of drugs found in defendant's car and the legal impact of the stipulation; thus, waiver of defendant's right of confrontation by counsel's stipulation to the evidence was not invalid).

People v. Bastien, 129 Ill.2d 64, 541 N.E.2d 670 (1989) Ch. 38, ¶106A-2, which permits a child's testimony in a sexual prosecution to be recorded without contemporaneous cross-examination and presented on

videotape if the child is available for cross-examination at trial, violates the right to confrontation.

People v. White, 40 Ill.2d 137, 238 N.E.2d 389 (1968) Defendant was denied a fair trial where he could not effectively cross-examine the complaining witness due to the latter's physical disability.

People v. Vandiver, 127 Ill.App.3d 63, 468 N.E.2d 454 (1st Dist. 1984) The use of dual interpreters during the testimony of a deaf-mute witness was upheld. The procedure did not violate defendant's right to confront witnesses. See also, **People v. Spencer**, 119 Ill.App.3d 971, 457 N.E.2d 473 (1st Dist. 1983).

People v. Feathers, 134 Ill.App.3d 1060, 481 N.E.2d 826 (5th Dist. 1985) The judge denied defendant a fair opportunity to confront his accuser where, during counsel's cross-examination of the complainant about her ability to recall what happened and her credibility, the judge interrupted counsel and limited cross-examination to 10 minutes because cross-examination had already lasted nearly two hours. There were various areas justifying further inquiry.

People v. Williams, 331 Ill.App.3d 662, 771 N.E.2d 1095 (1st Dist. 2002) At trial, defendant testified that his hearing aid had been confiscated, thereby preventing him from hearing the State's case, and the court simply instructed defense counsel to question defendant in a loud voice, without inquiring about the extent of defendant's hearing problem or what he had missed. During the sentencing hearing, defendant stated that he was deaf in one ear and heard only portions of the State's argument, and the court merely instructed defendant to talk as loudly as he wished, without inquiring about the extent of his disability or whether he had hearing aids.

The trial court violated defendant's rights to due process and confrontation. Once the trial court learned of defendant's hearing disability, it was obligated to make a meaningful inquiry into the nature and extent of the disability. Although the court had discretion to determine appropriate accommodations to protect defendant's rights to due process and confrontation, it could not do so without determining the extent of the problem.

Cumulative Digest Case Summaries **§57-6(b)(1)**

Ohio v. Clark, U.S. , S.Ct. , L.Ed.2d (2015) (No. 13-1352, 6/18/15)

1. The Sixth Amendment Confrontation Clause generally prohibits the introduction of testimonial statements by a witness who does not testify at trial. Under the "primary purpose" test, statements elicited through interrogation are testimonial when the circumstances objectively indicate that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

When the primary purpose of the interrogation is to respond to an ongoing emergency, its purpose is not to create a record for trial and thus statements elicited in response to such interrogation are not prohibited by the Confrontation Clause. But the "existence *vel non* of an ongoing emergency" is not the end of the inquiry; it is just one factor in the ultimate question about the primary purpose of the interrogation.

2. Teachers at L.P.'s preschool observed suspicious marks on his body and asked him who was responsible. L.P., who was three years old, eventually made statements to the teachers implicating defendant. These statements were introduced at trial, but L.P. did not testify. Defendant argued that the statements were testimonial and thus prohibited by the Confrontation Clause.

3. The Supreme Court held that the statements were not testimonial. The Court declined to adopt a categorical rule that statements made to persons other than law enforcement officers are never testimonial. But, such statements are much less likely to be testimonial. And considering all the relevant circumstances in this case, L.P.'s statements "clearly were not made with the primary purpose of creating evidence for [defendant's] prosecution," and thus were not barred by the Sixth Amendment.

First, the statements were made in the context of an ongoing emergency about suspected child abuse. When the teachers saw the injuries, they needed to know whether it was safe to release L.P. to his guardian at the end of the day. Their immediate concern was to protect L.P. by identifying and ending the abuse.

Second, there was no evidence that the primary purpose was to gather evidence for defendant's prosecution. The teachers never informed L.P. that his answers would be used to arrest or punish the abuser, and L.P. never indicated that he intended his statements to be used in a prosecution.

Third, L.P.'s young age contributed to the finding that the statements were not testimonial. "Statements by very young children will rarely, if ever, implicate the Confrontation Clause." Few three-year-old children understand the criminal justice system and it is unlikely that someone that young would intend his statements to be a substitute for trial testimony.

Finally, the Court found it highly relevant, if not categorically dispositive, that L.P. was speaking to teachers rather than law enforcement officers. Statements to persons who are not "principally charged with and uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers."

In light of all these circumstances, the Court held that the introduction of L.P.'s statements did not violate the Sixth Amendment.

4. The Court specifically rejected two of defendant's arguments. First, Ohio's mandatory reporting obligations for teachers did not turn their questions into the equivalent of police interrogation. Even with this obligation, the teacher's overriding concern "was to protect L.P. and remove him from harm's way." Such reporting statutes cannot convert concerned questions from a teacher "into a law enforcement mission aimed primarily at gathering evidence for a prosecution."

Second, the Court refused to view this issue from the jury's perspective. Doing so would make virtually all out-of-court statements testimonial. The prosecution typically offers those statements when they support its case, and in this context, the context the jury sees, all such statements could be viewed as testimonial. But the Court has never suggested that the Confrontation Clause bars all out-of-court statements that support the prosecution's case. Such a broad rule would eliminate the primary purpose test.

People v. Clendenin, 238 Ill.2d 302, 939 N.E.2d 310 (2010)

Because the decision whether to waive the right of confrontation is not among those decisions that ultimately belong to the defendant, defense counsel may waive the defendant's right of confrontation by entering into an evidentiary stipulation where two elements are met: (1) defendant does not object; and (2) the decision to stipulate is a matter of trial tactics and strategy. The exception to this general rule exists where the stipulation is the equivalent of a guilty plea, because defendant's constitutional right to plead not guilty is implicated. A stipulation is the equivalent of a guilty plea where either (1) the State's entire case is presented by stipulation and the defendant fails to present or preserve a defense; or (2) the stipulation concedes the sufficiency of the evidence to support the conviction. Only in those limited circumstances must the trial court personally admonish defendant about the stipulation and obtain defendant's agreement to the stipulation. No other restriction exists on defense counsel's authority to stipulate to the admission of evidence. **People v. Campbell**, 208 Ill.2d 203, 802 N.E.2d 1205 (2003); **People v. Phillips**, 217 Ill.2d 270, 840 N.E.2d 1194 (2005).

After denial of defendant's motion to suppress, the case proceeded by stipulated bench trial. The stipulation included the disclaimer that defendant stipulated to the sufficiency of the evidence to convict. It also preserved defendant's objection to the admission of the evidence that was the subject of his motion to suppress. The court asked defendant if he wished to be bound by the stipulation and defendant responded affirmatively. After the court found him guilty, defendant retained new counsel and an evidentiary hearing was conducted on his claim that his attorney had been ineffective in advising him to proceed by stipulation. Defendant testified that defense counsel had not explained the option of a stipulated bench trial to him "thoroughly," that his memory of the court asking him about the stipulation was vague, and that defense counsel had not shown him the stipulation and he did not want to be bound by it.

The Appellate Court concluded that implicit in **Campbell** and **Phillips** was the requirement that

defendant be apprised of the content of the stipulation to allow him a meaningful opportunity to object. Because defendant was provided no opportunity to review the stipulation, the Appellate Court reversed.

The Illinois Supreme Court found that defendant's efforts to disavow the stipulation were unavailing. Not only did the defendant not object to the stipulation, he expressed no disapproval of the stipulation when addressed by the trial judge, who had no duty to admonish defendant in any respect regarding the stipulation. The decision to proceed by stipulation was a matter of trial tactic and strategy by defense counsel who decided to seek suppression of the evidence, and the stipulation preserving the suppression issue was part of that strategy. The stipulation was not tantamount to a guilty plea. By its terms it did not concede the sufficiency of the evidence of guilt. It also preserved a defense because by it terms it contested the correctness of the court's ruling on the motion to suppress. The Appellate Court incorrectly found a restriction on defense counsel's authority to stipulate that is not found in either **Campbell** or **Phillips**.

People v. Kitch, 239 Ill.2d 452, 942 N.E.2d 1235 (2011)

The defense has an adequate opportunity to cross-examine a witness to satisfy the Sixth Amendment where the witness testifies on direct examination in sufficient detail to establish the element of each charged offense.

Defendant was charged with multiple counts of predatory criminal sexual assault of his stepdaughter and stepson and aggravated criminal sexual abuse of his stepson. It was undisputed that defendant was over the age of 17 and that the victims were under the age of 13 when the offenses occurred. Although it may have been unclear from the testimony of the victims when every act of sexual penetration or sexual conduct occurred, the State was not required to prove the dates of commission, only to provide some way to differentiate between the various counts. The direct-examination testimony of the stepdaughter and stepson established separate acts of sexual penetration or conduct as charged by the State during the relevant time period. Therefore their testimony provided enough detail to allow for effective cross-examination within the meaning of the Sixth Amendment.

(Defendant was represented by Assistant Deputy Defender Nancy Vincent, Springfield.)

People v. Clendenin, ___ Ill.App.3d ___, 913 N.E.2d 1179 (2d Dist. 2009)

1. Under **People v. Campbell**, 208 Ill.2d 203, 802 N.E.2d 1205 (2003) and **People v. Phillips**, 217 Ill.2d 270, 840 N.E.2d 1194 (2005), defense counsel may waive the defendant's right to confrontation by agreeing to a stipulation, so long as the defendant does not object and the decision to stipulate is a matter of trial tactics and strategy. However, the defendant must personally waive the right to confrontation if the stipulation contains a statement that the evidence is sufficient to convict, or if the State's entire case is to be presented by stipulation and a defense is neither presented nor preserved. In addition, the trial court is required to give guilty plea admonishments if a stipulation is tantamount to a guilty plea.

The Appellate Court found that the **Campbell/Phillips** rule implicitly requires that the defendant be informed of the specific content of a stipulation, either by the court or defense counsel or by having the stipulation read into the record. The court noted, however, that procedural admonishments are not required where the stipulation is a matter of sound trial tactics or strategy, and that the defendant need not affirmatively accept the stipulation so long as he fails to object once he has knowledge of its content.

Because the record showed that the defendant was unaware of the specific content of the stipulation on which his conviction rested, his failure to object cannot be construed as the informed acquiescence required by **Campbell/Phillips**. The court also found that defense counsel failed to handle the stipulations in a reasonable manner, and therefore did not adequately waive defendant's right to confrontation. The conviction was reversed and the cause remanded for a new trial.

2. In *dicta*, the court warned of the dangers inherent in the **Campbell/Phillips** rule for both defendants and defense counsel. The court urged the legislature to authorize the use of "conditional pleas," which allow the defendant to plead guilty while preserving certain pretrial issues for appeal. The court also concluded that the stipulation in this case was not a matter of sound trial tactics and strategy in the context

of the entire trial, because the stipulation contained evidence which assured defendant's conviction without providing either a strategic advantage or a basis on which defense counsel could argue that defendant was innocent. Thus, reversal would be required even if not necessitated by the failure to advise defendant of the content of the stipulation.

People v. Diggins, 2016 IL App (1st) 142088 (No. 1-14-2088, 5/31/16)

Under the confrontation clauses (U.S. Const. amend VI, Ill. Const., art I, §8), testimonial statements made out of court can be admitted only where the declarant is unavailable and where defendant has had a prior opportunity to cross-examine. Testimonial statements include affidavits.

Defendant was convicted of aggravated unlawful use of a weapon based on his failure to have a firearm owner's identification (FOID) card. To prove the lack of a FOID card, the State introduced a certified letter from the Illinois State Police stating that defendant's application for a FOID card had been denied. The document was signed and notarized.

The court held that the admission of the certified letter violated defendant's right of confrontation. The document constituted an affidavit that was testimonial hearsay. The affiant was not subject to prior cross-examination and was not shown to be unavailable. And the affidavit was admitted substantively for its truth.

Although defendant testified at trial that he did not have a FOID card, the court held that the error was not harmless. If the affidavit had been properly excluded, the State would not have been able to prove an essential element of the offense and defendant may have decided not to testify. The court reversed the conviction and remanded the case for a new trial.

(Defendant was represented by Assistant Defender Chris Bendik, Chicago.)

People v. Evans, 2016 IL App (3d) 140120 (No. 3-14-0120, 7/13/16)

A primary interest of the confrontation clause is the right of cross-examination. Generally, a witness is subject to cross-examination when he takes the stand under oath and willing answers questions and the opposing party has an opportunity to cross-examine him.

The State called a co-defendant who had already been convicted to testify against defendant. The State gave him use immunity and under these circumstances the State had the right to demand and expect his testimony. Co-defendant took the stand and answered a few preliminary questions. But when the State began asking questions about the circumstances and details of the crime, co-defendant refused to answer any questions. The State continued to ask multiple leading and suggestive questions about the crime, but co-defendant refused to answer them.

The court held that the State's questioning of co-defendant after he refused to answer questions about the crime deprived defendant of his right to confrontation. The State was allowed to establish evidence about the circumstances of the crime through it's own leading and suggestive questions, including evidence that inculpated defendant, but since co-defendant refused to testify, defendant was unable to confront and cross-examine him about these matters.

The court rejected the State's argument that its questions were merely attempts to impeach co-defendant with prior statements. The State failed to lay a proper foundation for using the statements as impeachment and in fact never introduced them into evidence. The court also rejected the State's argument that the questions were merely attempts to refresh co-defendant's recollection. Co-defendant never indicated that his memory was exhausted or that a prior statement would refresh his memory.

The court held that the improper questioning added critical weight to the State's case and since the remaining evidence against defendant was not overwhelming, the error was not harmless beyond a reasonable doubt. The court granted defendant a new trial.

(Defendant was represented by Assistant Defender Dimitri Golfis, Ottawa.)

People v. Hood, 2014 IL App (1st) 113534 (No. 1-11-3534, 10/6/14)

1. The right to confront witnesses includes the right to view and hear the witness and to help defense

counsel with cross-examination. Although the right to confrontation, like all constitutional rights, may be waived, there is a presumption against waiver, and any waiver must be a knowing, voluntary act with awareness of the consequences. For any waiver to be effective, it must be clearly established that there was an intentional relinquishment of a known right.

2. Here the State conducted an evidence deposition pursuant to Illinois Supreme Court Rule 414, which allows a party to take a deposition if there is a substantial possibility that the witness will not be available to testify at trial. During the deposition, the witness identified defendant as the offender. The prosecutor and defense counsel, but not defendant, were present for the video deposition, and defense counsel cross-examined the witness.

There was no waiver of defendant's confrontation right on the day of the deposition, nor during the next six status hearings. Finally, at a status hearing held over six months after the deposition, the State stated on the record that it had initially requested that defendant be present for the deposition but that defense counsel had waived his presence. Defense counsel confirmed that she had waived defendant's appearance. The video deposition was introduced as evidence during defendant's trial. Defendant made no objection at trial to his absence from the deposition.

3. On appeal, defendant argued that he had been denied his right to confrontation by not being present at the deposition. Although defense counsel stated that she had waived defendant's presence, the record did not show that defendant personally and knowingly waived his right to confrontation.

The Appellate Court agreed. The record contained no waiver of defendant's rights prior to or during the deposition. Additionally, there was no discussion of a waiver during the six status hearings held over a six-month period following the deposition. It was not until over six months later that the parties referred to an alleged off-the-record waiver by defense counsel of defendant's presence at the deposition. The record thus failed to show that defendant knowingly and voluntarily waived his right to confrontation.

4. The court further held that defendant did not properly waive his confrontation rights under Rule 414. Rule 414(e) provides that defendant and defense counsel may waive defendant's confrontation rights at a deposition in a written waiver. The court held that it was error to admit the deposition without a written waiver.

5. Although defendant failed to raise either issue below, the court reached the issues under the second prong of the plain error doctrine. Under this prong, a reviewing court may review procedurally defaulted claims where the error is so serious that defendant was denied a substantial right and thus a fair trial. Prejudice is presumed under the second prong due to the importance of the right involved.

The right to confront witnesses is a substantial constitutional right. Both errors involved the right to confront witnesses and thus they both concerned a substantial right reviewable under the second prong of plain error.

Defendant's conviction was reversed and the case remanded for a new trial.

6. The dissent would not have found a violation of the right to confrontation where defense counsel was present and cross-examined the witness. The dissent also would not have found that any error which might have occurred fell within the second prong of plain error. The second prong only applies to structural errors, a very limited class of cases which does not include defendant's right to be present at a deposition.

(Defendant was represented by Supervisor Shawn O'Toole, Chicago.)

People v. Jacobs, 405 Ill.App.3d 210, 939 N.E.2d 64, 2010 WL 4366876 (4th Dist. 2010)

The Sixth Amendment requires that a witness against the defendant appear at trial and be subject to cross-examination, or, if unavailable, that defendant have had a prior opportunity to cross-examine the witness. In **Melendez-Diaz v. Massachusetts**, 557 U.S. ___, 129 S.Ct. 2527, ___ L.Ed.2d ___ (2009), the Supreme Court concluded that a sworn certificate of analysis showing the results of forensic testing of seized substances were the functional equivalent of live, in-court testimony and thus inadmissible absent a showing that the analysts were unavailable to testify and that defendant had a prior opportunity to cross-examine them. The court noted that it did not hold that "anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the

prosecution's case." 129 S.Ct. at 2532 n.1.

One of the foundational requirements for the admission of a breathalyzer-test result is that the machine used was regularly tested for accuracy. A police officer's testimony that the machine was certified as accurate based on logbook entries, offered to satisfy that foundational requirement, were not testimonial. The certifications were not compiled during the investigation of a particular crime and do not establish the criminal wrongdoing of a defendant. They did nothing more than establish that the machine was tested and working properly.

People v. McNeal, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2010) (No. 1-08-2264, 9/30/10), superceded by 405 Ill.App.3d 647, 955 N.E.2d 32

To determine whether hearsay is testimonial, the focus is on whether, at the time the statement was made, the declarant was acting in a manner analogous to a witness at trial, describing or giving information regarding events that had previously occurred. When the statement is the product of questioning by law enforcement personnel, the objective intent of the questioner is the focus. Otherwise, the proper focus is the intent of the declarant and the inquiry is whether the objective circumstances would lead a reasonable person to conclude that the statement would be used against the defendant.

The hearsay testimony of a nurse regarding the statements of the complainant contained in the triage notes of another nurse was not testimonial. The declarant was the nurse who prepared the triage notes. Because her intent was to gather information for treatment and not prosecution, the notes were not testimonial.

(Defendant was represented by Assistant Defender Gilbert Lenz, Chicago.)

People v. Munoz-Salgado, 2016 IL App (2d) 140325 (No. 2-14-0325, 9/8/16)

The right of confrontation only applies where the primary purpose of an out-of-court statement is testimonial. Outside the context of police interrogation, the declarant's intent determines whether a statement is testimonial. To be testimonial, a reasonable person in declarant's position would anticipate her statement being used against the accused in a criminal prosecution.

An emergency room nurse conducted a sexual assault examination on the victim. During the exam, the nurse asked the victim several questions about the assault. The victim told the nurse that defendant threw her face down on a bed, held her down, put on a condom, and forcefully had sex with her. The State introduced the victim's out-of-court statements at defendant's trial.

The court held that the victim's statements did not violate the confrontation clause. The nurse conducted an examination with the two-fold purpose of collecting evidence for possible use in a criminal prosecution and ensuring that the victim received medical treatment. The medical exam was necessary and appropriate, and required the nurse to obtain a history from the victim of the events leading to her seeking treatment. Under these circumstances, the victim's statement was not primarily for the purpose of gathering evidence.

Defendant's conviction was affirmed.

(Defendant was represented by Assistant Defender Fletcher Hamill, Elgin.)

People v. Weinke, 2016 IL App (1st) 141196 (No. 1-14-1196, 3/1/16)

1. On the first day defendant appeared in court, the prosecutor asked the court for permission to conduct a video deposition of the victim to preserve her testimony, asserting that she had suffered critical injuries and it was unclear how long she would survive. Defendant objected to the request.

On the following day, the prosecutor filed a written motion pursuant to Supreme Court Rule 414 requesting that a video deposition be taken that afternoon due to the "substantial possibility" that the victim would be unavailable for trial. The motion contained no details or documentation, but the prosecutor stated that the victim was due for surgery a few days later and her injuries were very extensive. Defendant again objected stating that he was not prepared to cross-examine the victim. The prosecutor stated that based on her review of the medical records and conversations with the victim's physicians, she might not survive her

upcoming surgery.

The court granted the motion and scheduled the deposition that afternoon. Defendant again objected on the basis that he had no time to prepare. When the prosecutor again asserted that the victim might not survive much longer, the court stated that it was granting the motion based on the prosecutor's representation as to the severity of the victim's condition and the chance that she might not survive.

The deposition was taken that afternoon and the victim died two months later prior to trial. At trial, the State moved to admit the deposition. Defendant objected arguing that the lack of notice deprived him of an opportunity to effectively cross-examine the victim. Defendant also submitted the victim's medical records and contended that the prosecution had provided the court with inaccurate information about her condition by exaggerating the extent of her injuries and the seriousness of her condition, and by falsely claiming that its information had come from the treating physicians.

The trial court allowed the deposition into evidence and following a bench trial convicted defendant of first degree murder. The Appellate Court held that the deposition was improperly admitted.

2. First, the court held that as a matter of law the State failed to meet its burden under Rule 414 of providing the court with evidence that the deposition was necessary because there was a substantial possibility that the witness would be unavailable at trial. Ill. S. Ct. R. 414. The State's written motion was "perfunctory, cursory, and without any supporting documentation."

Instead, the State relied on its oral assertions about the victim's injuries and medical condition. But none of these assertions constituted evidence. They were simply assertions. The court thus found that even if the assertions had been accurate, they did not satisfy the rule's requirement that at least some evidence is needed to satisfy the movant's burden. Additionally, the court found that many of the State's assertions were "false, misleading, or both." The State seriously exaggerated the victim's injuries and her medical condition, as well as the source of its information.

Allowing the deposition to be taken before defendant had an opportunity to investigate the case and develop evidence gave the defense virtually no ability to fulfill its necessary adversarial function. Under these circumstances, granting the deposition was reversible error.

3. The court also found that the admission of the deposition violated defendant's right to confront witnesses under the federal and Illinois constitutions. Preexisting testimony is admissible if the witness is unavailable at trial and defendant had an adequate opportunity to effectively cross-examine the witness. To determine whether a defendant had an adequate opportunity for cross-examination, courts examine the motive and focus of the prior cross-examination, whether the cross was unlimited, and what counsel knew when conducting the examination.

The court found that here the motive was the same and that there was no limit placed on counsel's cross. But the focus of the cross would have been different at trial because counsel was not prepared to question whether the evidence supported defendant's guilt because he had no opportunity to prepare for the hastily convened deposition. Additionally, counsel was at a "severe informational disadvantage" due to his inability to prepare. Thus, since counsel did not have an adequate opportunity to cross-examine the witness, the use of the deposition at trial violated defendant's right to confrontation.

Defendant's conviction was reversed and remanded for a new trial.

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§57-6(b)(2)
Right to Face-to-Face Confrontation

Coy v. Iowa, 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988) The use of a screen between defendant and two child complainants (so that the youths could not see defendant when they testified) violated defendant's right to confrontation, which includes not only the right to cross-examine but also the right to a "face-to-face encounter" with the witnesses. The right of confrontation is not outweighed by the general

need to protect sexual abuse victims or generalizations about youthful witnesses. Any exception to this rule must be based upon case-specific findings about a particular witness or to further an important public policy.

Maryland v. Craig, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990) Allowing a child sex offense complainant to testify by way of closed circuit television does not necessarily violate the right of confrontation:

"[W]here necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate, the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation."

People v. Lofton, 194 Ill.2d 40, 740 N.E.2d 782 (2000) The trial court erred by allowing the six-year-old complainant to testify while seated behind podiums which blocked her from defendant's view pursuant to 725 ILCS 5/105B-5, which permits testimony by means of a closed circuit television for certain victims if the testimony is taken during the proceeding and the judge determines that testimony in the courtroom will result in the victim suffering serious emotional distress such that the victim cannot reasonably communicate or that is likely to cause the victim to suffer severe adverse effects.

Where closed circuit television is used, defendant is able to view the victim on the video monitor and can suggest lines of cross-examination to his attorney. Here, the court's decision to have the complainant testify while seated behind podiums was not authorized under Illinois law, and denied defendant any opportunity to view the witness and propose possible lines of cross-examination. Also, by limiting defendant's ability to aid in cross-examination, the procedure impeded the truth-seeking function of the confrontation clause and failed to insure that the evidence was reliable.

People v. Weninger, 243 Ill.App.3d 719, 611 N.E.2d 77 (3d Dist. 1993) It was appropriate to allow defendant's 10-year-old adopted daughter, the victim in a criminal sexual assault case, to testify via closed circuit television. An expert witness testified that the complainant feared defendant and believed that he would try to look at her or "get her" and that the child's symptoms would "minimally" increase if she testified in defendant's presence. The witness also believed that testifying in defendant's presence might increase the period of treatment the complainant would need. The "obvious import" of the expert's testimony was that serious adverse effects were likely if in-court testimony was required.

People v. Miller, 311 Ill.App.3d 772, 725 N.E.2d 48 (5th Dist. 2000) Although the use of closed circuit television is statutorily authorized in limited circumstances, the statute does not dispense with the requirement that the trier of fact be permitted to observe the witness's demeanor. Thus, where closed circuit television is authorized for taking testimony, "courts must assure that the video equipment will be technologically efficient and constantly monitor the equipment to prevent such events as occurred in this trial."

Defendant's right to confrontation was violated where the video feed for the complainant's televised testimony malfunctioned, and the judge responded to the jury's concern by reading a transcript of the complainant's entire testimony.

People v. Rohlfs, 368 Ill.App.3d 540, 858 N.E.2d 616 (3d Dist. 2006) The court did not abuse its discretion by ordering that defendant observe an evidentiary deposition, which was taken in the complainant's home, by one-way, closed circuit television. Although a defendant enjoys the right to face-to-face confrontation of witnesses, a narrow exception to that right exists where there is an individualized showing of necessity and the trial court makes arrangements that strike a proper balance between the constitutional right and the needs of the case. Because the witness was of advanced age and physically unable to leave her home without

assistance, and because defendant was unwilling to agree to a continuance until after the witness had surgery, the court made a reasonable accommodation of the right to confrontation by allowing defendant to observe the deposition by one-way closed circuit television.

People v. Hood, 2016 IL 118581 (No. 118581, 9/22/16)

1. A criminal defendant has a constitutional right to physically face persons who testify against him and to conduct cross-examination. Under **Crawford v. Washington**, 541 U.S. 36 (2004), where the State seeks to admit "testimonial" hearsay, it must establish both that the declarant is unavailable to testify at trial and that defendant had a prior opportunity for cross-examination. Under **Crawford,** depositions are testimonial hearsay.

2. Here, the State sought to admit the deposition of the complainant. The court found that the State demonstrated that the complainant was unavailable to testify at trial and that defendant had a prior opportunity for cross-examination. The complainant's attending physician testified that at the time of trial, the complainant was living in a nursing home and was unable to care for himself. In addition, the testimony established that the complainant was suffering from severe dementia, had no awareness of his environment, and was unable to communicate in any meaningful way.

Furthermore, defendant had the opportunity for cross-examination although he was not present at the deposition. The court noted that defendant was not barred or prevented from attending the deposition; in fact, the trial court's order for the deposition directed the Cook County Sheriff to transport defendant to the deposition "over the objection of the defendant." This paragraph was then crossed out by hand. At trial, defense counsel confirmed that he had waived defendant's presence at the deposition. Under these circumstances, defendant was fully aware that the deposition had been ordered and that he had the right to attend.

In addition, two assistant public defenders appeared on defendant's behalf at the deposition and conducted cross-examined.

Because both the unavailability of the complainant and a prior opportunity for cross-examination were shown, admission of the deposition did not violate **Crawford**.

3. Similarly, admission of the deposition did not violate defendant's due process right to be present. The due process right to be present is a "lesser right" that is violated only if the defendant's absence results in an unfair proceeding or the loss of an underlying substantial right. The court found that because defendant's confrontation rights were not violated, there could be no violation of the secondary due process right to be present.

4. Supreme Court Rule 414(e) provides that defendant and defense counsel have the right to confront and cross-examine any witness whose deposition is taken, but that defendant and defense counsel "may waive such right in writing." The court rejected the argument that the trial court violated Rule 414(e) by admitting a deposition that had been obtained without defendant's written waiver. The court found that the written waiver requirement was not constitutionally mandated, but was merely a procedural rule to ensure the defendant was given notice of the deposition and an opportunity to appear. Where it was clear that defendant knew of the deposition and that he could attend if he wanted, the absence of a written waiver did not cause prejudice.

Defendant's conviction was affirmed.

(Defendant was represented by Assistant Defender Shawn O'Toole, Chicago.)

People v. Hernandez, 394 Ill.App.3d 527, 915 N.E.2d 856 (1st Dist. 2009)

Under **People v. Patrick**, 233 Ill.2d 62, 908 N.E.2d 1 (2009), the trial court abuses its discretion by refusing to rule on a motion *in limine* concerning the admissibility of defendant's prior convictions, so long

as the court has sufficient information to make a ruling before the defendant testifies. Under **Patrick**, a trial court which wishes to reserve ruling on such a pretrial motion must place on the record the basis for finding that a delay is necessary.

Where the trial court followed a blanket policy of refusing to rule on motions *in limine* to exclude prior convictions until after the defendant testified, and the judge had sufficient information on which to make a ruling before trial, an abuse of discretion occurred.

The court rejected the argument that the error was harmless, noting that defendant was hampered in his ability to make a reasonable tactical decision whether to testify and to anticipatorily disclose the prior convictions in order to lessen the negative impact on his credibility. In addition, defendant's credibility was a critical issue because the case was essentially a credibility contest between the defendant and the complainant.

Defendant's conviction was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Heidi Lambros, Chicago.)

People v. Salgado, 2012 IL App (2d) 100945 (No. 2-10-0945, 3/15/12)

1. The Sixth Amendment right to confront witnesses is distinct from the due-process right to be present at trial, and includes the right to hear and to view witnesses as they testify. When a defendant appears by counsel, the right to confront witnesses includes the ability to be of aid in counsel's cross-examination. A violation of the right to confront affects defendant's substantial right to a fair trial and may be noticed as plain error regardless of the strength of the State's evidence.

2. The court distinguished the loss of the right to confront when counsel agrees to the admission of stipulated testimony, from the loss of the right to confront a live witness. Where counsel stipulates to testimony, the loss of the right to confront is of a very limited scope because the parties know in advance precisely what the trier of fact is going to hear and the manner in which it will be presented. The dynamics are profoundly different with a live witness. With live testimony, a defendant's ability to see and to interact with counsel is critical, and the damage from that loss is unknowable. Thus, unlike the case of stipulated testimony, any waiver of the right to confront a live witness must be knowing and voluntary, after defendant is advised of his right to confront the witness.

3. The Appellate Court concluded that defendant was denied his right to confront a witness against him when at the State's request, the court allowed a minor child to testify in chambers outside the presence of the defendant. Defendant did not validly waive his right to confront as nothing in the record showed that defendant understood that he had the right to be present, and knowingly and voluntarily waived that right. The record showed only that counsel asked for a moment with his client, and then indicated his client would remain in the courtroom when the court asked defense counsel his position regarding the State's request.

This plain error results in reversal of the defendant's conviction and remand for a new trial.

(Defendant was represented by Assistant Defender Yasemin Eken, Elgin.)

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§57-6(b)(3)
Scope of Cross-Examination Generally

People v. Williams, 66 Ill.2d 478, 363 N.E.2d 801 (1977) Generally, cross-examination is limited to the subject matter inquired into on direct. But, it is proper on cross-examination to develop all circumstances within the witness's knowledge that explain, qualify, discredit, or destroy his direct testimony though they may incidentally constitute new matter which aids the cross-examiner's case. See also, **People v. Enis**, 139 Ill.2d 264, 564 N.E.2d 1155 (1990); **People v. Truly**, 318 Ill.App.3d 217, 741 N.E.2d 1115 (1st Dist. 2000);

People v. Davis, 70 Ill.App.3d 454, 388 N.E.2d 887 (1st Dist. 1979) (cross-examination for the purpose of impeaching a witness is not limited to matters brought out on direct examination); **People v. Welte**, 77 Ill.App.3d 663, 396 N.E.2d 315 (4th Dist. 1979) (the State properly cross-examined a defense witness about his failure to volunteer alibi information to the police officers because the questioning came within the rule permitting the State to develop circumstances and knowledge of the witness to explain, qualify, or discredit his direct testimony); **People v. Rios**, 145 Ill.App.3d 571, 495 N.E.2d 1103 (1st Dist. 1986) (at defendant's trial for murder, the prosecutor properly cross-examined defendant about whether he had ever owned a rifle where a rifle was the murder weapon, and on direct examination defendant testified that he had never shot a rifle; it was within the permissible scope of cross-examination to discredit that direct testimony).

People v. Kirchner, 194 Ill.2d 502, 743 N.E.2d 94 (2000) A reviewing court will not overrule the trial judge's ruling on the scope of cross-examination unless there has been a clear abuse of discretion resulting in manifest prejudice. See also**,** **People v. Mason**, 28 Ill.2d 396, 192 N.E.2d 835 (1963) (the scope of cross-examination is within the trial court's discretion, but the widest latitude should generally be allowed for the purpose of establishing bias).

People v. Struck, 29 Ill.2d 310, 194 N.E.2d 236 (1963) When identification is in issue, defendant should be given considerable latitude on cross-examination to test the identification, means of observation, and memory of the witness. See also, **People v. Watkins**, 23 Ill.App.3d 1054, 320 N.E.2d 59 (1st Dist. 1974) (the court erred by refusing to allow defendant to cross-examine witnesses about their identification of a person against whom the same charge had been dismissed, for the witnesses' ability to observe, recollect, and narrate the actions of a person whom they identified would certainly be pertinent to their ability to do likewise to the activities of defendant); **People v. Lewis**, 18 Ill.App.3d 281, 309 N.E.2d 784 (1st Dist. 1974) (defendant was improperly precluded from cross-examining identification witness to test ability to recollect and describe the perpetrators of the alleged crime); **People v. Gonzalez**, 175 Ill.App.3d 466, 529 N.E.2d 1027 (1st Dist. 1988).

People v. Enis, 139 Ill.2d 264, 564 N.E.2d 1155 (1990) 1. It is improper to ask a witness to speculate about matters beyond his personal knowledge or to judge the veracity of other witnesses or evidence. See also, **People v. Greeley**, 14 Ill.2d 428, 152 N.E.2d 825 (1958) (it is improper to cross-examine a defendant's character witnesses concerning their knowledge of his guilt); **People v. Mitchell**, 200 Ill.App.3d 969, 558 N.E.2d 559 (5th Dist. 1990) (improper for prosecutor to question defendant regarding his opinion of the truthfulness of other witnesses); **People v. Nwadiei**, 207 Ill.App.3d 869, 566 N.E.2d 470 (1st Dist. 1990) (the prosecutor committed reversible error by repeatedly asking defendant whether six state witnesses were lying and whether one unnamed person (who never testified) would be lying if he reported that defendant had committed an unrelated arson; the error was prejudicial because the improper questions were asked 23 times and comprised most of the State's cross-examination, and the prosecutor improperly suggested that defendant had committed the unrelated arson). But see, **People v. Kokoraleis**, 132 Ill.2d 235, 547 N.E.2d 202 (1989) (cross-examination of defendant regarding whether several witnesses were lying when they testified in a manner contrary to his version was not necessarily inappropriate where defendant testified that the police coerced his inculpatory statement, and there is authority for permitting such cross-examination when defendant testifies on direct examination that his statements were coerced; even if the cross-examination was improper, it was not prejudicial in light of the strong evidence of guilt).

2. Where, in a murder case involving a victim who was a complainant in a criminal sexual assault case against defendant, defendant denied on cross-examination knowing why the victim had charged with him with assault and knowing specific facts about the sex offense, it was improper for the prosecutor to continue to question him about the specifics of that case.

People v. Blue, 205 Ill.2d 1, 792 N.E.2d 1149 (2001) Although the trial court has discretion to limit cross-examination to prevent harassment, prejudice, jury confusion, risk to witness safety, and repetitive or irrelevant questioning, such discretionary authority may be exercised only after the court permits sufficient cross-examination to satisfy the confrontation clause. See also, **People v. Triplett**, 108 Ill.2d 463, 485 N.E.2d 9 (1985); **People v. Collins**, 106 Ill.2d 237, 478 N.E.2d 267 (1985) (the prosecutor's question to a witness, "I saw you in the hall and you had an earring in your nose isn't that correct?" was improper and "showed a total lack of professionalism on the part of the" prosecutor but was harmless); **People v. Phillips**, 129 Ill.App.2d 455, 263 N.E.2d 353 (3d Dist. 1970) (cross-examination designed to humiliate or harass the witness is irrelevant to the issues and is properly excluded; attempt to impeach witness's testimony that he lived at certain address for eight years by showing that he had been in county jail for 90 days during that period was improper); **People v. Phillips**, 127 Ill.2d 499, 538 N.E.2d 500 (1989) (State's cross-examination of expert witness was not inflammatory but merely sought to clarify the expert's credentials and billing methods, which are legitimate areas of cross-examination); **People v. Charleston**, 132 Ill.App.3d 769, 477 N.E.2d 762 (2d Dist. 1985) (the State appropriately cross-examined a defense chemist about a testing error he made in a prior, unrelated case).

People v. Godsey, 74 Ill.2d 64, 383 N.E.2d 988 (1978) The prosecutor's cross-examination of defendant's wife (concerning her refusal to testify before the grand jury) was plain and reversible error.

People v. Hawkins, 61 Ill.2d 23, 329 N.E.2d 221 (1975) The State's cross-examination of defendant's mother, who testified to defendant's alibi, about whether she was present at a juvenile hearing (defendant was originally brought in as a juvenile but charged as an adult) when four witnesses testified to inconsistent alibi evidence was improper because the cross-examination informed the jury that a different alibi defense had been presented at an earlier proceeding.

People v. Littlejohn, 144 Ill.App.3d 813, 494 N.E.2d 677 (1st Dist. 1986) Fitness to stand trial is not relevant to whether defendant was sane at the time of the offense; thus, "any cross-examination as to defendant's fitness to stand trial was irrelevant and should not have been permitted." The error was "compounded" by the State's use of one expert's opinion as to fitness to impeach another expert's opinion as to insanity — "the State attempted to show disagreement in an area of inquiry that is irrelevant in order to undermine the credibility of [an expert's] testimony concerning the key issue of defendant's sanity at the time of the offense."

People v. Starks, 116 Ill.App.3d 384, 451 N.E.2d 1298 (1st Dist. 1983) 1. The State cannot introduce evidence that is irrelevant and only serves to cause the jury to believe that defendant is a bad person, and hence likely to be guilty of the crime charged. The State's cross-examination of defendant (who was charged with murder and attempt armed robbery) about whether he collected unemployment benefits because he failed to report certain income from a part-time job, along with the State's reference to the cross-examination during its closing argument as proof that defendant was a cheat, liar, and robber, was improper. The cross-examination had no probative value as to defendant's guilt or innocence. The State cannot introduce evidence that is irrelevant and only serves to cause the jury to believe that defendant is a bad person, and hence likely to be guilty of the crime charged.

2. The prosecutor also asked an inappropriate hypothetical question. After defendant said that he did not kill the victim (in response to the State's inquiry), the State next asked, "And, of course, if you did shoot him in cold blood, if you weren't trying to kill him, you would come right in here and tell us all about it, wouldn't you?" Defendant again said, "No." In closing argument, the prosecutor referred to the above exchange as the "only true words out of [defendant's] mouth." The prosecutor's use of the hypothetical question was improper because it might mislead the jury - a negative answer may show "nothing more than defendant's awareness of his Fifth Amendment right not to make any statement."

People v. Rutledge, 45 Ill.App.3d 779, 359 N.E.2d 1233 (3d Dist. 1977) The State committed plain error by indicating that it had offered the witness a polygraph examination.

People v. Scott, 17 Ill.App.3d 532, 308 N.E.2d 342 (1st Dist. 1974) The trial court committed reversible error in failing to allow defendant to cross-examine his co-defendant; co-defendant's testimony tended to incriminate defendant, and until she testified there was no notice or warning that her testimony would be antagonistic.

People v. Doll, 126 Ill.App.3d 495, 467 N.E.2d 335 (2d Dist. 1984) When a witness testifies to reputation, he or she may be asked whether he or she has actually heard the reputation discussed, by whom, when, and where. The trial court erred in precluding the defense from cross-examining a police officer (who testified that he knew defendant and her reputation for truth and veracity, and that she was not always known to tell the truth) about from whom the officer had acquired his information.

Cumulative Digest Case Summaries **§57-6(b)(3)**

People v. Becker, 239 Ill.2d 215, 940 N.E.2d 1131 (2010)

It is improper to ask one witness to comment on the credibility of another witness. Because the practical effect of the testimony of an expert witness that the defense sought to offer was to comment on the credibility of the child-complainant, the trial court did not abuse its discretion in excluding the testimony of the expert.

People v. Richardson, 2013 IL App (1st) 111788 (No. 1-11-1788, 11/13/13)

A trial court should admit evidence concerning the circumstances of the defendant's confession, including evidence concerning the method used to take a statement.

An assistant State's Attorney testified that she prepared defendant's written statement. Although she did not record exactly every word defendant said, she summarized defendant's statement accurately and permitted defendant to make any corrections she chose. The trial court sustained prosecution objections to defense questions regarding whether defendant could have been given the opportunity to write her statement in her own words, or have her statement videorecorded. In sustaining an objection to the question regarding videorecording, the trial court added "that's done in homicide cases."

The trial court abused its discretion in restricting defendant from cross-examining prosecution witnesses concerning other possible methods of taking a statement from defendant, and the prosecution's choice to use the method that gave the assistant State's Attorney control over the words of the statement and prevented the jury from seeing defendant's demeanor at the time she gave her statement. This evidence would have shown that the assistant State's Attorney chose the method that gave her the most control over the wording of the statement and did not offer defendant alternatives that would have recorded defendant's words more accurately.

The jury was instructed to consider all of the circumstances under which the statement was made, but the court's restriction on cross-examination left the jury without the evidence needed to fully understand those circumstances. Defendant was prejudiced in this closely-balanced case where the prosecutor relied on the statement as its principal proof of defendant's guilt.

Mason, J., dissented.

(Defendant was represented by Assistant Defender Rachel Moran, Chicago.)

People v. Stevens, 2013 IL App (1st) 111075 (No. 1-11-1075, 6/14/13)

The privilege against self-incrimination may be waived by a defendant who testifies as a witness. Once the privilege has been waived, a defendant becomes subject to cross-examination in the same manner

as any other witness. The waiver is not partial. Defendant cannot choose to testify and present a defense and then limit the State's ability to impeach that testimony by avoiding relevant impeachment evidence during his direct examination. He cannot claim the privilege on cross-examination on matters reasonably related to the subject matter of his direct examination.

Defendant waived his privilege against self-incrimination when he chose to testify that his sexual encounter with the complainant was consensual. He could not reassert the privilege on cross-examination when the prosecutor questioned him regarding another offense to discredit defendant's claim of a consensual encounter, where evidence of that other offense had been properly admitted in the State's case-in-chief as propensity evidence (725 ILCS 5/115-7.3).

(Defendant was represented by Assistant Defender Brett Zeeb, Chicago.)

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§57-6(b)(4)
Impeaching a Witness

§57-6(b)(4)(a)
Generally

People v. Sandoval, 135 Ill.2d 159, 552 N.E.2d 726 (1990) 1. A witness may not be impeached on cross-examination on a collateral matter. But see, **People v. McGhee**, 20 Ill.App.3d 915, 314 N.E.2d 313 (1st Dist. 1974) (cross-examination may include collateral matters for the limited purpose of testing the witness's credibility; the latitude to be permitted rests in the discretion of the trial court).

2. Whether a matter is collateral may be determined by asking, "Could the matter be introduced for any purpose other than to contradict?" See, **People v. Byer**, 75 Ill.App.3d 658, 394 N.E.2d 632 (1st Dist. 1979) (a contradiction is not collateral if it involves a part of the witness's account about which he would not have been mistaken if his story were true).

3. Here, the trial court did not abuse its discretion by precluding the defense from impeaching the victim's cross-examination testimony (that she had not gone to a bar a few days before trial) with a witness's testimony that he saw the victim at the bar and that she was "hanging all over" male friends, even though the victim had testified on direct examination that the alleged incident with defendant (criminal sexual assault) changed her relationship with men, making her unable to date. The testimony did not go to whether defendant forced complainant to have anal and oral sex against her will. See also, **People v. Collins**, 106 Ill.2d 237, 478 N.E.2d 267 (1985) (the court did not abuse its discretion by ruling that defense witness's testimony about what she and defendant did on their first date, three days before the murder, was not collateral because it went to her ability to recall their activities during that second week of November when the murders occurred); **People v. Williams**, 205 Ill.App.3d 1001, 564 N.E.2d 168 (1st Dist. 1990) (at a trial for the robbery of a Hertz office at an airport, the State erred by questioning defendant about his military service and experience with weapons or ammunition because such questioning was "so far removed from the crime charged, [that] the State could not reasonably have expected its questions to produce useful information"); **People v. Pumphrey**, 51 Ill.App.3d 94, 366 N.E.2d 433 (1st Dist. 1977) (the cross-examination of defendant and his wife concerning their prior use of assumed names was reversible error, for their use of assumed names had nothing to do with the issues in the case).

People v. Cookson, 215 Ill.2d 194, 830 N.E.2d 484 (2005) 1. The proper procedure for impeaching a witness's reputation for truthfulness is through the use of reputation evidence, not through opinion or evidence of specific instances of untruthfulness. A prior false accusation of sexual assault against other persons might be admissible to show a witness's bias, interest, or motive to testify falsely; however, the evidence must be such as to give rise to an inference that the witness has something to gain or lose by her

testimony.

2. The judge did not err by excluding evidence that a complaint of sexual abuse, which the minor made against her natural father, was determined by DCFS to be "unfounded." Although the complainant's credibility was essential to the State's theory that defendant had committed sexual abuse, a prior false complaint of sexual abuse against another person did not give rise to a belief that the complainant was interested, biased, or motivated to falsify concerning defendant.

People v. Wilkerson, 87 Ill.2d 151, 429 N.E.2d 526 (1981) A court "may not exclude otherwise admissible impeachment because it feels that the witness has already been sufficiently impeached." See also, **People v. Thompson**, 75 Ill.App.3d 901, 394 N.E.2d 422 (1st Dist. 1979).

In re K.S., 387 Ill.App.3d 570, 900 N.E.2d 1275 (1st Dist. 2008) 1. A witness's medical condition is a permissible area of impeachment, provided that the relevance of the evidence is established before it is introduced. See also, **People v. Flowers**, 371 Ill.App.3d 326, 862 N.E.2d 1085 (1st Dist. 2007) (the trial court erred by denying defendant the opportunity to cross-examine a State's witness based on his mental health records, where those records showed that the witness suffered from severe major depression with psychotic features and complained of auditory and visual hallucinations and the records were relevant to show that the witness had complained of hallucinations in the past and to assist the jury in evaluating both the witness's ability to perceive the alleged crime and the credibility of his claim that he was not hallucinating on the day of the shooting); **People v. Plummer**, 344 Ill.App.3d 1016, 801 N.E.2d 1045 (1st Dist. 2003).

2. Where defendant seeks to obtain mental health records of a witness, a two-step process is followed. First, defendant must show that the requested records are relevant to credibility. Second, if the witness or a therapist asserts a statutory privilege, an in camera hearing must be held to determine materiality and relevance. A statutory privilege against disclosure of mental health records must give way to defendant's due process rights, at least to the extent that the privileged information is relevant and impeaching.

3. Where three of the State's witnesses at a delinquency proceeding attended a special school which refused to release their records without a court order, the trial judge should have held an in camera hearing to determine the extent to which the requested records would have been relevant and material.

People v. Averhart, 311 Ill.App.3d 492, 724 N.E.2d 154 (1st Dist. 1999) 1. A criminal defendant is entitled to cross-examine a witness to expose any hostile motivation that may explain, discredit, or destroy his testimony. The right to confrontation is satisfied where the entire record shows that the jury has been "made aware of adequate factors concerning relevant areas of impeachment," even if defendant was prevented from inquiring into other areas, and the right to cross-examination is violated where the limitations create "a substantial danger of prejudice by denying defendant his right to test the truth of the testimony." Although the trial court has discretionary authority to restrict the scope of cross-examination, that authority "comes into play" only after the court has permitted sufficient cross-examination to satisfy the Confrontation Clause.

2. The court erred by limiting defendant's reference to the arresting officer's prior, allegedly physically abusive arrest of defendant as an "encounter" and requiring the defense to refer to defendant's earlier professional standards complaint against the officer as a "serious charge." The defense theory was that the officer framed defendant to discredit him and to foreclose the possibility that a previously-filed complaint might be reopened. The limitations gave the jury an incomplete and inaccurate version of the factual basis of the defense theory.

3. Apart from the constitutional issue, the court's restrictions were improper under its discretionary authority to limit cross-examination, for limitations on cross-examination that prevent defendant from presenting his theory of the case represent an abuse of discretion.

People v. McCoy, 2016 IL App (1st) 130988 (No. 1-13-0988, 9/15/16)

1. It is improper for the State to question a witness for purposes of impeachment unless it is prepared to offer proof of the impeaching information. In other words, the State must possess a good-faith basis for cross-examination questions as well as the intent and ability to complete the impeachment.

At defendant's murder trial, the prosecution erred in cross-examining defendant where it asked whether defendant had threatened to kill the decedent's family if decedent said anything about defendant having been at the scene. There was nothing in the record to suggest that the State had the intent or ability to complete the impeachment by showing that defendant had made such a threat. Although the decedent made several statements to first responders before he died, there was no evidence to suggest that he told anyone that defendant threatened to kill his family. "In short, there was simply no evidence whatsoever to support the State's question."

The court concluded that the error was not harmless. Because there were no witnesses to the actual shooting and defendant offered an explanation for his presence in the decedent's car, the jury's verdict rested primarily on whether it found defendant's testimony to be credible. In addition, when defendant denied making the threat the State's Attorney implied that defendant was lying. The court also noted that the nature of the State's accusation "was so outrageous that it colored the entire trial."

2. A prior conviction is admissible to attack a witness's credibility where the prior crime: (1) was punishable by death or imprisonment of more than a year or involved dishonesty or a false statement, (2) was less than 10 years old or the witness was released from confinement within the last 10 years, and (3) has sufficient probative value to outweigh any danger of unfair prejudice. The trial court should consider, among other things, the nature of the prior conviction, the length of the witness's criminal record, the witness's age and circumstances, and the extent to which it is more important for the jury to hear defendant's story than to learn of a prior conviction. Although a prior conviction need not be excluded merely because it was for a similar crime to that for which the defendant is on trial, the trial court should be cautious in admitting such convictions.

Here, the trial court abused its discretion by admitting a prior attempt murder conviction at defendant's trial for murder. Not only was the prior conviction nearly identical to the crime charged, but in closing argument the prosecutor repeatedly encouraged the jury to focus on the prior conviction rather than the charge. Because the prejudicial effect of the prior conviction outweighed its probative value, admission of the evidence constituted error.

Defendant's conviction for murder was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Rebecca Cohen, Chicago.)

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§57-6(b)(4)(b)
Bias, Interest, Motive

Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)

"A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is always relevant as discrediting the witness and affecting the weight of his testimony. We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination."

Olden v. Kentucky, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988) The trial court precluded defense counsel from cross-examining the complainant in a sex offense (in which the defense was that the sex act was consensual) about the fact that she was living with her boyfriend at the time of the offense to show that the complainant fabricated her testimony out of fear of her boyfriend, who may have seen the complainant with defendant.

The court prohibited such questioning on grounds that the evidence's probative value was outweighed by its prejudicial effect (the complainant was Caucasian and her boyfriend (as well as defendant) was African American, and knowledge that the two were living together could have prejudiced her). The court's ruling violated defendant's right of confrontation. Defendant was entitled to expose complainant's motivation for testifying, and the jury may have viewed her credibility quite differently if it had been allowed to hear the evidence about her relationship with her boyfriend.

People v. Blue, 205 Ill.2d 1, 792 N.E.2d 1149 (2001) 1. The Sixth Amendment right to confrontation includes the right to cross-examine an adverse witnesses to show bias, prejudice or ulterior motives. See **People v. Klepper**, 234 Ill.2d 337, 917 N.E.2d 381 (2009) ; **People v. Henson**, 32 Ill.App.3d 717, 336 N.E.2d 264 (5th Dist. 1975).

2. A criminal defendant is entitled to the "widest latitude" to establish bias or motive by a State's witness. See also, **People v. Wilkerson**, 87 Ill.2d 151, 429 N.E.2d 526 (1981). The confrontation clause is violated where defendant is prohibited from engaging in cross-examination "designed to show a prototypical form of bias on the part of the witness."

3. Where the defense contended that three of the five State's witnesses were rival gang members and drug sellers, and therefore had a motive to falsely accuse defendant, cross-examination concerning the witnesses' gang membership was relevant to their credibility and should have been allowed. The prejudicial effect of the evidence did not outweigh its probative value. See **People v. Harris**, 262 Ill.App.3d 35, 634 N.E.2d 318 (2nd Dist. 1994) (holding that the trial court may exclude marginally relevant evidence relating to bias if the probative value is outweighed by possible prejudice to the State and the likelihood of juror confusion).

4. While cross-examination beyond the scope of direct examination is generally improper, defendant is entitled to inquire into matters which explain or discredit a witness's testimony, even if new matter which aids the defense is incidentally placed before the jury.

People v. Triplett, 108 Ill.2d 463, 485 N.E.2d 9 (1985) The evidence used must not be remote or uncertain, and it must give rise to the inference that the witness has something to gain or lose by his testimony. See also, **People v. Dowdy**, 140 Ill.App.3d 631, 488 N.E.2d 1326 (2d Dist. 1986).

People v. Klepper, 234 Ill.2d 337, 917 N.E.2d 381 (2009)

The trial judge may impose limits on defense counsel's inquiries about potential bias where necessary to protect the witness's safety, or to avoid harassment, prejudice, confusion of the issues, or interrogation that is repetitive or of little relevance. In evaluating whether a particular limitation on cross-examination violated the Confrontation Clause, the reviewing court must consider whether the inability to make a particular inquiry deprived defendant of the ability to test the truth of the witness's direct testimony. Where the cross-examination which the trial court permitted was sufficient to make the finder of fact aware of the relevant areas of bias, the court's limitation on further cross-examination did not cause prejudice. Therefore, no Confrontation Clause violation occurred.

People v. Foskey, 136 Ill.2d 66, 554 N.E.2d 192 (1990) Defendant's right of confrontation prevailed over his wife's claim of marital privilege where the privileged conversations had the potential to demonstrate the wife's bias or motive to testify falsely against defendant.

People v. Coles, 74 Ill.2d 393, 385 N.E.2d 694 (1979) The judge committed reversible error in precluding the defense from cross-examining the State's chief witness about the fact that her husband beat her after defendant told him that they were having an affair. The witness's relationship to defendant was a basis for bias, making the cross-examination appropriate.

People v. Gonzalez, 104 Ill.2d 332, 472 N.E.2d 417 (1984) The judge committed reversible error by precluding the defense from cross-examining a State witness, who identified defendant as the offender, about certain gang activities. Defendant, who claimed he was framed, had withdrawn from the gang, this witness was a "collector" and "enforcer" for the gang, gang members (including the witness) had threatened to "get" defendant, and the gang had harassed defendant's family. See also, **People v. Roman**, 248 Ill.App.3d 1085, 618 N.E.2d 786 (1st Dist. 1993) (the court erred in prohibiting defendant from questioning two State eyewitnesses, who were his rival gang members, regarding threats they made to defendant's wife, where defendant's wife would have testified that the witnesses had threatened to retaliate against her if she testified and to kill defendant if he were acquitted, on grounds that the wife's testimony would "clutter the record"; because the two witnesses were the decedent's close friends and rival gang members, the threats were relevant to their bias and motive to lie).

People v. Harris, 123 Ill.2d 113, 526 N.E.2d 335 (1988) The trial court erred in precluding defendants from impeaching a State witness, a prison inmate, with his subjective hopes of obtaining restoration of his previously revoked good time in exchange for his trial testimony. Because the witness's "subjective hopes of restoration of good-time credits or other leniency were relevant on cross-examination," defense counsel was "entitled to impeach for bias with proof of promises of leniency or expectations of special favors." Here, "the trial judge mistakenly believed defense counsel could not make such an inquiry without first establishing proof of a deal," a belief that is "clearly incorrect."

People v. Rogers, 123 Ill.2d 487, 528 N.E.2d 667 (1988) The trial court erred in precluding the defense from questioning a State witness, who had played at least a limited role in planning the robbery and murder, about various aspects of the witness's police interrogation, on grounds that the questions called for hearsay or irrelevant information. The questioning was a legitimate attempt to cast doubt on the witness's veracity - defense counsel was not attempting to elicit out-of-court statements to prove the truth of the matter asserted, but only to show that such statements may have motivated the witness to give false testimony. The trial court at times misapprehended the applicability of the hearsay rule and at other times failed to recognize defendant's broad latitude in proving bias. See also, **People v. Adams**, 129 Ill.App.3d 202, 472 N.E.2d 135 (1st Dist. 1984) (the judge committed reversible error by prohibiting defendants from cross-examining the State's chief witness -- whose implication of defendant led to their convictions -- and a police officer about whether the witness had been charged with the offenses before he named defendants, whether he had received Miranda warnings, and whether he had been free to leave the police station before making statements implicating defendants; this evidence was relevant to the witness's motive to testify falsely -- if the witness were under suspicion, arrested or charged in this case, it could provide him with a motive to cast suspicion from himself by pointing the finger of guilt at others).

People v. Kline, 92 Ill.2d 490, 442 N.E.2d 154 (1982) While the trial court may have erred in refusing to allow defendant to cross-examine his estranged wife, the State's chief witness, concerning her alleged nervous breakdown during the year she implicated defendant to the police, defendant suffered no prejudice where the case was tried by a judge and the judge had ample evidence from which to assess the wife's credibility. Also, the court's refusal to allow defendant to cross-examine his wife about conversations she had with a divorce attorney was not prejudicial where defendant's wife admitted writing to defendant about her plans for a divorce and her letter was introduced into evidence.

People v. Flowers, 371 Ill.App.3d 326, 862 N.E.2d 1085 (1st Dist. 2007) 1. Defendant is entitled to cross-examine on possible bias without first showing that any interest or motive exists on the part of the witness. Similarly, the defense need not show that promises of leniency have actually been made. But see, **People v. Hinson**, 70 Ill.App.3d 880, 388 N.E.2d 899 (5th Dist. 1979) (before defendant is allowed to cross-examine State witnesses about bias against a group (a union in this case) with which defendant was

affiliated, defendant is required to show, as a foundation, that the witnesses knew defendant was a member of that group).

2. The judge erred by precluding cross-examination concerning whether, in return for cooperating in the murder case against defendant, a State witness might have been promised leniency on a home invasion charge. Although defendant had no evidence of any agreement between the witness and the State and there was no pending charge against the witness at the time of defendant's trial, the witness pleaded guilty and received a six-year-sentence on a Class X felony while the charges were pending against defendant. Also, the witness was on parole at the time of his testimony. Under these circumstances, the possibility of leniency was not so remote as to preclude cross-examination.

People v. McCollum, 239 Ill.App.3d 593, 607 N.E.2d 240 (3d Dist. 1992) Though a witness has the right to refuse to be interviewed by the opposing side, that refusal is admissible to show bias, hostility, or interest. The trial court erred by refusing to allow the defense to bring out a deputy's refusal to speak with the defense investigator. Accord, **People v. Atteberry**, 213 Ill.App.3d 851, 572 N.E.2d 434 (3d Dist. 1991) (it "highly prejudicial" to refuse to allow defendant to show that the only eyewitness refused to talk to the defense before trial); **People v. Timmons**, 114 Ill.App.3d 861, 449 N.E.2d 1366 (3d Dist. 1983) (the trial judge erred by prohibiting defense counsel from impeaching a State witness, a police officer, by showing that she refused to speak with defense counsel about the case before trial); **People v. Brown**, 122 Ill.App.3d 452, 461 N.E.2d 71 (2d Dist. 1984).

People v. Clamuextle, 255 Ill.App.3d 504, 626 N.E.2d 741 (2d Dist. 1994) A witness's status as an illegal alien is relevant to her credibility, because she might be vulnerable to real or imagined pressure to curry favor with the government by testifying for the State. See also, **People v. Austin**, 123 Ill.App.3d 788, 463 N.E.2d 444 (2d Dist. 1984) (defendants should have been permitted to cross-examine certain State witnesses concerning their citizen status; the fact they were illegal aliens might have given them a motive to testify favorably for the State).

People v. Pizzi, 94 Ill.App.3d 415, 418 N.E.2d 1024 (1st Dist. 1981) The trial judge committed reversible error by prohibiting defendants from cross-examining a State witness about alleged offers to drop criminal charges in return for payment of several thousand dollars to the alleged theft victim. Because the evidence was close and the testimony of the witness important, the error was not harmless.

People v. Ward, 153 Ill.App.3d 413, 505 N.E.2d 1251 (1st Dist. 1987) In a case where defendant was convicted of criminal sexual assault and aggravated kidnapping based solely on the complainant's testimony, the judge should have allowed the defense to show that defendant had testified against the complainant's boyfriend in a different case (which resulted in the 40-year prison term for the complainant's boyfriend). Evidence that defendant helped imprison complainant's boyfriend would have tended to impeach the complainant's testimony (by showing a basis for hostility toward defendant). See also, **People v. Crosser**, 117 Ill.App.3d 24, 452 N.E.2d 857 (2d Dist. 1983) (it was error to refuse to allow defendant to cross-examine the complainant concerning the latter's pending civil lawsuit against defendant for damages arising from the acts in this case; bias "may be shown by the fact that the witness has a lawsuit pending against that party"). But see, **People v. Nowak**, 76 Ill.App.3d 472, 395 N.E.2d 28 (1st Dist. 1979) (the judge properly prohibited cross-examination of State witnesses about a five-year-old incident with defendant where the incident was remote and its relevance uncertain).

People v. Phillips, 95 Ill.App.3d 1013, 420 N.E.2d 837 (1st Dist. 1981) In a case where defendant was charged with attempt murder and other charges arising from the shooting of a police officer, the judge committed reversible error by prohibiting defendant from cross-examining the officer about the fact that he had been suspended 15 times, including for improperly displaying a weapon and filing a false report. The suspensions were not remote, uncertain or collateral, because the officer "could have been motivated to

testify falsely to avoid a further suspension, or worse, termination." See also, **People v. Chavez**, 338 Ill.App.3d 835, 789 N.E.2d 354 (1st Dist. 2003) (where the defense claimed that an officer who testified about defendant's alleged oral statement was motivated to fabricate the statement because defendant had a pending lawsuit against the police department for shooting him, the court erred by refusing cross-examination of the officer about whether he told defendant that he would not "see a dime" from the lawsuit and that the officer who had shot him "should have killed you while he had the chance"); **People v. Lenard**, 79 Ill.App.3d 1046, 398 N.E.2d 1054 (1st Dist. 1979) (the trial court abused its discretion by refusing to allow the defense to cross-examine the arresting officers concerning a beating they allegedly inflicted on defendant; the alleged beating was a proper subject for cross-examination, as defendant was attempting to show that the officers' testimony should not be believed because they were attempting a "cover-up").

People v. Hughes, 51 Ill.App.3d 985, 367 N.E.2d 485 (3d Dist. 1977) If a witness has or may have a financial interest or benefit depending on the outcome of the case, the quality of his testimony may be influenced, and the defense is entitled to so inquire. Here, the judge committed reversible error in barring defendant, whose defense was self-defense, from inquiring whether the complaining witness was "only interested in receiving restitution for his medical expenses and indifferent or opposed to pursuance of further criminal charges against" defendant. See also, **People v. Greer**, 293 Ill.App.3d 861, 689 N.E.2d 134 (3d Dist. 1997) (the judge erroneously excluded cross-examination on State's financial assistance to witness, for this information was relevant to show bias); **People v. Garrett**, 44 Ill.App.3d 429, 358 N.E.2d 197 (5th Dist. 1976) (defendant should have been allowed to inquire whether the police had helped a State's witness (an informer) financially, whether police had received a complaint from defendant's mother about the informer, and whether the informer had been hospitalized before trial due to drug problems); **People v. Thompson**, 75 Ill.App.3d 901, 394 N.E.2d 422 (1st Dist. 1979) (the judge committed reversible error in precluding defendant, who was charged with the theft of certain rental collections from her place of employment, a realty company, from cross-examining the complaining witness (the company president) about whether the institution of criminal proceedings was a precondition to filing an insurance claim for the loss where the evidence tended to show interest, bias, or motive of the witness); **People v. Jones**, 70 Ill.App.3d 338, 387 N.E.2d 1010 (1st Dist. 1979) (the court did not abuse its discretion by prohibiting defendant from cross-examining the complainant about the amount of damages she sought in a related civil suit against defendant, where the judge allowed questioning as to the civil suit but merely prohibited questions about the amount of damages). Compare, **People v. Martinez**, 120 Ill.App.3d 305, 458 N.E.2d 104 (1st Dist. 1983) (bias is not shown by fact that witness might someday file a civil suit against the defendant; the mere potential of litigation is "so indefinite and questionable as to have little probative value").

People v. Gordon, 128 Ill.App.3d 92, 470 N.E.2d 29 (1st Dist. 1984) Defendant was allowed to question a police officer, who searched defendant's apartment and discovered cocaine, along with defendant and a man named Cruz, about whether the officer was aware that Cruz's mother was an officer and that Cruz was released after the officer spoke with Cruz's mother, where defendant's theory of defense was that Cruz brought the cocaine into his apartment without defendant's knowledge or consent. The inquiry involved the witness's bias or motive, i.e., whether the knowledge that Cruz's mother was a police officer, influenced the officer's action and testimony.

People v. Gray, 209 Ill.App.3d 407, 568 N.E.2d 219 (1st Dist. 1991) In an aggravated criminal sexual assault case of a 14-year-old girl, the trial court prohibited the defense from calling a witness to testify that the complainant had told her that defendant did not rape her and that she fabricated the claim against him because she feared she was pregnant by a man named Keith, on grounds that the defense failed to lay a foundation for the statement during the complainant's cross-examination. The court abused its discretion in refusing to allow the defense to recall the complainant and in precluding cross-examination of the complainant about her alleged fear of pregnancy as a possible motive to make a false rape charge because

such testimony was relevant and showed her motive to testify falsely.

People v. Frieberg, 147 Ill.2d 326, 589 N.E.2d 508 (1992) The trial court properly prohibited the defense from showing the authorized sentences for the dismissed charges under the accomplice's plea (although the State and the accomplice had believed that the accomplice was receiving a three-year reduction in the possible sentence, he actually received an 18-year reduction). Because the accomplice believed he was receiving a three-year benefit under the plea agreement, it is irrelevant that the actual benefit was much greater.

Cumulative Digest Case Summaries **§57-6(b)(4)(b)**

People v. Fultz, 2012 IL App (2d) 101101 (No. 2-10-1101, 6/11/12)

The confrontation clause of the Sixth Amendment guarantees a defendant the right to cross-examine a witness against him regarding bias or motive to testify falsely. The evidence of bias or motive must not be remote or uncertain, and it must give rise to an inference that the witness has something to gain or lose by his testimony. Trial judges retain wide latitude to impose reasonable limits on a defense inquiry into the potential bias of a witness, based on various concerns, including confusion of the issues or interrogation that is of little relevance.

The court abused its discretion in denying defendant the opportunity to cross-examine a police officer-complainant regarding what the defense believed to be a 41-day delay in seeking authorization from the State's Attorney to file a felony aggravated battery charge against the defendant, after the witness learned that defendant's mother had filed a complaint with the police department about the conduct of the police. Contrary to the State's argument, the defense sought only to question the officer about his decisions and actions, and not about the processes in the police department and State's Attorney's office for pursuing felony charges.

However, the Appellate Court concluded that it could not find the error reversible by itself because no offer of proof was made and therefore it could not assess whether the questioning would have resulted only in remote or uncertain evidence of bias or motive. The court did conclude that the cumulative effect of this error and an instructional error required retrial.

(Defendant was represented by Assistant Defender Paul Rogers, Elgin.)

People v. Wilson, 2012 IL App (1st) 092910 (No. 1-09-2910, 2/9/12)

1. The constitutional right to confront witnesses includes the right to inquire into a witness's bias, interest, or motive to testify falsely. On cross-examination, the defense is entitled to wide latitude to attempt to establish bias or motive. To be admissible, evidence used to establish bias or motive must give rise to an inference that the witness has something to lose or gain by testifying. Such evidence must not be remote or uncertain.

2. At defendant's trial for aggravated unlawful use of a weapon and unlawful use of a weapon, the trial court erred by precluding the defendant from introducing records of an Independent Police Review Authority investigation of the arresting officers' conduct during the events leading to the charges against the defendant. The defense theory was that after a police officer shot the unarmed defendant and planted a gun near him, officers mishandled the gun to account for the fact that it did not contain defendant's fingerprints. In his motion *in limine*, defendant presented evidence that the IPRA investigation concerned whether the first officer improperly fired at defendant and whether two other officers improperly handled the gun found next to the defendant.

The Appellate Court concluded that the IPRA investigation gave rise to an inference that the witnesses had something to lose or gain by testifying, because the investigation involved the same incident for which the defendant was charged and the outcome of both the investigation and the trial depended in

large part on the testifying officers' portrayal of the events. "For obvious reasons, if an officer subjected to an IPRA investigation provides a statement to an investigator, the same officer could be motivated to testify consistently at a trial regarding the same incident to maintain his or her credibility."

The court concluded that evidence of the IPRA investigation was not remote or uncertain and directly affected the defendant's case. Therefore, the evidence should have been admitted on the issue of the motive and bias of the arresting officers.

3. The court concluded that the "abuse of discretion" standard of review applied to the above question. The court viewed the trial court's ruling as denying the motion *in limine* concerning the IPRA investigation, but allowing the defense to cross-examine on all relevant manners including interest or bias based on evidence other than the IPRA records. Rulings on motions *in limine* are generally left to the trial court's discretion, as are matters involving the admission of evidence. Furthermore, the trial court has discretion to limit the scope of cross-examination.

Defendant's convictions were reversed and the cause remanded for resentencing.

(Defendant was represented by Assistant Defender Scott Main, Chicago.)

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§57-6(b)(4)(c)
Prior Statement

People v. Edwards, 55 Ill.2d 25, 302 N.E.2d 306 (1973) Trial court committed harmless error by prohibiting defendant from cross-examining a State witness concerning an alleged prior statement that, although he had seen defendant near the crime scene, he knew defendant did not commit the crime.

People v. Santos, 211 Ill.2d 395, 813 N.E.2d 159 (2004) The rape shield statute prevented defendant from introducing the victim's prior inconsistent statements to emergency room personnel regarding the victim's sexual contact with a male other than defendant during the 72 hours preceding the offense. This information was not relevant to the question of whether defendant reasonably believed that the victim was of age when the sex act occurred.

People v. Robinson, 368 Ill.App.3d 963, 859 N.E.2d 232 (1st Dist. 2006) 1. The foundation requirement for impeachment with a prior inconsistent statement is satisfied by presenting the place, circumstances, and substance of the earlier statement and giving the witness an opportunity to explain the inconsistencies. Although a "better" method of providing the required foundation is to read the exact question and answer to the witness, it is "not always necessary to repeat the question and answer."

2. The judge erred by refusing to allow defendant to cross-examine the arresting officer on prior inconsistent testimony to the grand jury concerning whether defendant had driven the car before his arrest. The defense theory was that because the officer was willing to mislead the grand jury to get an indictment, it was reasonable to infer that he was willing to mislead the trier of fact to obtain a conviction. Thus, such cross-examination was proper and should have been permitted.

People v. Timmons, 114 Ill.App.3d 861, 449 N.E.2d 1366 (3d Dist. 1983) The trial court committed reversible error in allowing the State to ask defendant why he did not tell authorities before trial regarding his whereabouts on the day in question where defendant's direct examination testimony -- that he was at several locations on that day, excluding the site of the crime -- was not inconsistent with his pretrial statement to the police -- that he did not commit the crime. Defendant's trial testimony "merely filled in the details as to his whereabouts and activities on the day."

People v. Burgess, 2015 IL App (1st) 130657 (No. 1-13-0657, 8/14/15)

1. It is generally improper for a prosecutor to ask a defendant to comment on the veracity of other witnesses. But a prosecutor may ask such questions if they require the defendant to explain his story in light of overwhelming conflicting evidence.

Here there was overwhelming evidence conflicting with defendant's version of events. It was therefore proper for the prosecutor to ask defendant if he had heard the testimony of three prosecution witnesses and why his version of events differed so crucially from that testimony.

2. Before a witness can be impeached with a prior inconsistent statement, counsel must lay a proper foundation by presenting the place, circumstances and substance of the prior statement to the witness and giving him an opportunity to explain the inconsistency. The purpose of this rule is to avoid unfair surprise.

Defendant wanted to impeach a witness with the testimony of the witness' uncle that he had heard the witness tell his father he did not want to lie anymore. While cross-examining the witness, defense counsel asked whether the witness had engaged in any conversations with his father in front of his uncle. The witness denied any such conversations. Defense counsel did not ask the witness about any specific conversation.

Later, when defense counsel tried to ask the uncle about the alleged conversation between the witness and his father, the trial court sustained the State's objection on the basis that counsel had failed to lay a proper foundation to impeach the witness.

The Appellate Court upheld the trial court's ruling. The court rejected defendant's argument that he had laid a proper foundation by asking the witness whether he had any conversations with his father in front of the uncle. This question did not provide the witness any notice about the substance of the uncle's proposed testimony and hence did not eliminate the element of unfair surprise.

(Defendant was represented by former Assistant Defender Jim Morrissey and Assistant Defender Yasaman Navai, Chicago.)

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§57-6(b)(4)(d)
"Immoral" Conduct

People v. Butler, 58 Ill.2d 45, 317 N.E.2d 35 (1974) It was improper to elicit through cross-examining defendant that he had lived with a woman in Chicago, with another woman in another city, and with a woman on returning to Chicago. The only apparent purpose of eliciting this information was to show that defendant was of bad moral character. See also, **People v. Armstead**, 322 Ill.App.3d 1, 748 N.E.2d 691 (1st Dist. 2001) (the State committed reversible error by repeatedly questioning defendant about his cohabitation with a long-time girlfriend before his arrest, and his marriage to a different woman shortly thereafter); **People v. Bailey**, 77 Ill.App.3d 953, 404 N.E.2d 258 (2d Dist. 1979) (the cross-examination of defense witnesses, which suggested immoral conduct, was error where the examination included questions concerning whether defendant and his girlfriend slept together and the closeness of the relationship between defendant's mother and a certain male friend).

People v. Santos, 211 Ill.2d 395, 813 N.E.2d 159 (2004) The rape shield statute bars evidence of the victim's alleged prior sexual activity or reputation, subject to two exceptions: 1) evidence of past sexual activity with the accused, offered as evidence of consent; and 2) where the admission of such evidence is constitutionally required. See also, **People v. Newman**, 123 Ill.App.3d 43, 462 N.E.2d 731 (5th Dist. 1984) (in a trial for deviate sexual assault, the court properly prohibited the defense from establishing that the complainant was

a prostitute under the rape shield law).

People v. Gibson, 133 Ill.App.2d 722, 272 N.E.2d 274 (3d Dist. 1971) It is proper to cross-examine a witness to bring out his unlawful and disreputable occupation and activity as a matter affecting credibility. The court discussed leading cases in this area.

People v. Truly, 318 Ill.App.3d 217, 741 N.E.2d 1115 (1st Dist. 2000) Defendant's post-conviction petition made a substantial showing that the right to confrontation was violated by restrictions on cross-examination concerning a witness's arrests for prostitution and receipt of supervision for criminal trespass. The arrests and sentence were relevant to impeach the witness's claims that she had been too frightened to remain in the area where the offenses occurred. Also, the petition made a substantial showing that the inability to cross-examine the witness about the areas she frequented after the crimes prevented defendant from challenging her credibility by rebutting her claim that she was fearful after the offenses.

People v. Long, 316 Ill.App.3d 919, 738 N.E.2d 216 (1st Dist. 2000) The trial judge erred by asking a defense witness who was a police officer whether he had obeyed "a rule in the Chicago Police Department that a police officer who intends to appear in a criminal case and testify on behalf of a defendant must call the State's Attorney's Office." Neither the court nor the State had been able to discover such a rule, and if such a regulation existed the officer's failure to comply would be immaterial and therefore an improper ground for impeachment. The court also noted that because the questioning was by the judge rather than the prosecutor, the error may "have had greater effect on the jury."

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§57-6(b)(4)(e)
Use of Drugs

People v. Strother, 53 Ill.2d 95, 290 N.E.2d 201 (1972) Whether a witness is a narcotics addict is relevant to his credibility; "the testimony of a narcotics addict is subject to suspicion due to the fact that habitual users of narcotics become notorious liars." Defendant was unduly restricted by not being allowed to examine a witness's arm for needle marks and to exhibit them to the jury. See also, **People v. Perez**, 92 Ill.App.2d 366, 235 N.E.2d 335 (1st Dist. 1968).

People v. Collins, 106 Ill.2d 237, 478 N.E.2d 267 (1985) Whether a witness is a narcotic addict at the time of testifying or at the time of the offense affects the witness's credibility and ability to recall. The State's cross-examination of a defense alibi witness concerning her addiction to heroin (she was addicted to heroin before the incident but was a "heroin detoxicate" on a methadone program at the time of the offense) was proper.

People v. Stalions, 139 Ill.App.3d 1033, 488 N.E.2d 297 (3d Dist. 1986) Trial court's refusal to permit defendant to cross-examine the State's sole eyewitness concerning her habit of glue sniffing was reversible error where the evidence was relevant because it may have affected her mental processes and hence her credibility.

People v. McCommon, 79 Ill.App.3d 853, 399 N.E.2d 224 (1st Dist. 1979) Trial court properly prohibited defendant from asking a State witness, on cross-examination, whether he ever used controlled substances where there was no evidence in the record that the witness used narcotics, and defense counsel did not make an offer of proof to support his question. See also, **People v. Yuknis**, 79 Ill.App.3d 243, 398 N.E.2d 258 (1st Dist. 1978) (defendant was properly prohibited from cross-examining a witness concerning drugs found in

a public gangway outside of a 20-unit apartment building where the witness lived where the connection between the witness and the drugs was too uncertain to justify its admission).

People v. Montanez, 55 Ill.App.3d 215, 371 N.E.2d 135 (2d Dist. 1977) Defendant was not entitled to an instruction that drug addiction affects a witness's credibility because the witness denied being an addict and there was no evidence to contradict her.

People v. Lamparter, 56 Ill.App.3d 823, 371 N.E.2d 997 (5th Dist. 1977) It was reversible error for prosecutor, at a trial for delivery of heroin, to cross-examine defendant concerning his prior use of drugs and his methadone treatment.

People v. Givens, 135 Ill.App.3d 810, 482 N.E.2d 211 (4th Dist. 1985) Where the State witness was "extensively cross-examined concerning his drug use," admitted using drugs for several years, and admitted taking cocaine a few days before the incident, the trial judge did not err by refusing to allow a defense witness to testify about her observations of the witness's previous drug use or by refusing to allow a police officer to testify that an alley behind the tavern where the witness met defendants was a place where illegal drugs were injected. The proffered testimony neither added to nor contradicted the State witness's own testimony.

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§57-6(b)(4)(f)
Prior Convictions

§57-6(b)(4)(f)(1)
Generally

Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) "[T]he cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness. One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. By so doing the cross-examiner intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony. The introduction of evidence of a prior crime is thus a general attack on the credibility of the witness."

See also, **People v. Triplett**, 108 Ill.2d 463, 485 N.E.2d 9 (1985).

McGauth v. California, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971) A defendant who takes the stand in his own behalf may be impeached by proof of prior convictions.

Loper v. Beto, 405 U.S. 473, 92 S.Ct. 1014, 31 L.Ed.2d 374 (1972) A conviction obtained in violation of the right to counsel cannot be used as impeachment. See also, **People v. Woollums**, 143 Ill.App.3d 814, 493 N.E.2d 696 (4th Dist. 1986) (convictions obtained in violation of a constitutional right cannot be used for impeachment purposes).

Luce v. U.S., 469 U.S. 38, 105 S.Ct. 460, 83 L.Ed.2d 443 (1984) By not testifying at trial, defendant waived issue regarding the propriety of the trial court's ruling denying defendant's pretrial motion to preclude the prosecution from using his prior convictions to impeach him. Accord, **People v. Redman**, 141 Ill.App.3d 691, 490 N.E.2d 958 (4th Dist. 1986). See also,
People v. Patrick, 233 Ill.2d 62, 908 N.E.2d 1 (2009) (defendant Phillips forfeited issue of the trial court's

refusal to rule on his motion *in limine* seeking to bar the use of prior convictions for impeachment by not testifying).

Ohler v. U.S., 529 U.S. 753, 120 S.Ct. 1851, 146 L.Ed.2d 826 (2000) In federal prosecutions, a criminal defendant who discloses a prior conviction on direct examination, even after the trial court has ruled that the conviction is admissible as impeachment, forfeits the right to appeal the propriety of that ruling.

People v. Montgomery, 47 Ill.2d 510, 268 N.E.2d 695 (1971) 1. For the purpose of attacking a witness's credibility, evidence that he has been convicted of a crime, except on a plea of nolo contendere, is admissible but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, or (2) involved dishonesty or false statement regardless of the punishment unless (3) in either case, the judge determines that the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice.

2. Evidence of a conviction under this rule is not admissible if a period of more than 10 years had elapsed since the date of conviction or of the release of the witness from confinement, whichever is the later date.

3. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure, and (2) the procedure under which the same was granted or issued required a substantial showing of rehabilitation or was based on innocence.

4. Evidence of juvenile adjudications is generally not admissible under this rule. The judge may, however, allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the judge is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

5. The pendency of an appeal does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible. See also, **People v. Bey**, 42 Ill.2d 139, 246 N.E.2d 287 (1969) (a conviction which is pending on appeal may be used as impeachment; a judgment of conviction stands until it is reversed).

See also, **People v. Yost**, 78 Ill.2d 292, 399 N.E.2d 1283 (1980); **People v. Warmack**, 83 Ill.2d 112, 413 N.E.2d 1254 (1980).

People v. Naylor, 229 Ill.2d 584, 893 N.E.2d 653 (2008) 1. The proponent of the prior conviction has the burden of showing defendant's release date; otherwise, the date of conviction is used in calculating the 10-year-limitation.

2. The 10-year-period during which a prior conviction can be admitted as impeachment is calculated by using the date of trial, not the date on which the offense was committed.

3. The 10-year limitation is based on the belief that 10 years of conviction-free living demonstrates that a witness has been rehabilitated. The running of the 10-year limit may be tolled if a defendant attempts to manipulate the judicial system by delaying trial so that a prior conviction would be inadmissible.

People v. Thomas, 164 Ill.2d 410, 647 N.E.2d 983 (1995) Only a judgment of a conviction may be used for impeachment purposes, and evidence of an arrest is inadmissible as impeachment. Accord, **People v. Robertson**, 198 Ill.App.3d 98, 555 N.E.2d 778 (2d Dist. 1990); **People v. Tyson**, 137 Ill.App.3d 912, 485 N.E.2d 523 (2d Dist. 1985). But see, **People v. Valentine**, 299 Ill.App.3d 1, 700 N.E.2d 700 (1st Dist. 1998) (an exception to the general Montgomery rule exists where a witness testifies on direct examination regarding some aspects of his criminal record, and thereby "opens the door" to evidence of other prior criminal conduct; thus, if a witness testifies on direct examination that he has never been arrested, the State is permitted to cross-examine him regarding any prior arrests); **People v. Brown**, 61 Ill.App.3d 180, 377 N.E.2d 1201 (1st Dist. 1978) (defendant's testimony that he had been previously convicted of petty theft but

had not been in any trouble or arrested in the past five years did not open the door to the State asking defendant about other arrests and conviction for possession of a hypodermic needle (a crime not punishable by more than one year in prison and not involving dishonesty); defendant did not imply an absence of other trouble before the five-year-period about which he testified); **People v. Morando**, 169 Ill.App.3d 716, 523 N.E.2d 1061 (1st Dist. 1988) (generally, "instances of past misconduct not resulting in conviction may not be inquired into on cross-examination of a defendant for purposes of impeaching credibility, though such inquiry may be permissible to show bias, interest, or motive to testify falsely").

People v. Boclair, 129 Ill.2d 458, 544 N.E.2d 715 (1989) The trial court did not abuse its discretion in prohibiting defendant from inquiring into the circumstances of a State witness's prior murder conviction and limiting defendant to inquiring into the date and nature of the conviction. Though the State opened the door on direct examination by questioning the witness about the prior conviction, limits may be placed on the scope of cross-examination once the door has been opened. The witness was not on trial and it would only muddy the waters to dredge up the details about the murder conviction. The court's ruling did not prevent the jury from judging the witness's demeanor or credibility.

People v. Davis, 95 Ill.2d 1, 447 N.E.2d 353 (1983) When the name of the witness is the same as the person named in the prior conviction, there is a rebuttable presumption that they are the same person. See also, **People v. Hall**, 145 Ill.App.3d 873, 495 N.E.2d 1379 (5th Dist. 1986).

People v. Williams, 161 Ill.2d 1, 641 N.E.2d 296 (1994) Defendant did not forfeit argument (regarding State's impeachment with a voluntary manslaughter conviction) by testifying on direct examination that he told the police that he had just been paroled for manslaughter and would not have gotten involved in a murder. Where a motion to exclude evidence has been denied, defendant does not forfeit the issue by revealing the evidence in hopes of lessening its impact.

People v. Elliott, 274 Ill.App.3d 901, 654 N.E.2d 636 (1st Dist. 1995) Trial judges "must be especially cautious when the prior conviction is for the same or substantially the same conduct for which the accused is on trial." Generally, prior convictions for the same crime as that charged should be admitted "sparingly." See also, **People v. Whirl**, 351 Ill.App.3d 464, 814 N.E.2d 872 (2nd Dist. 2004) (same); **People v. Moman**, 201 Ill.App.3d 293, 558 N.E.2d 1275 (1st Dist. 1990) (trial court did not abuse its discretion by allowing the State to impeach defendant, at a jury trial for armed robbery, with a prior armed robbery conviction, where the prior conviction was relatively recent to the instant charge and bore on defendant's veracity); **People v. Alexander**, 184 Ill.App.3d 855, 540 N.E.2d 949 (1st Dist. 1989) (proper to impeach defendant with prior conviction for voluntary manslaughter at his trial for murder); **People v. Miles**, 186 Ill.App.3d 370, 542 N.E.2d 530 (4th Dist. 1989) (proper to impeach defendant with prior convictions for burglary, forgery, and theft at his trial for attempt residential burglary); **People v. Siebert**, 72 Ill.App.3d 895, 390 N.E.2d 1322 (1st Dist. 1979) (improper to impeach defendant with prior California conviction for "possession of marijuana for sale" at a trial for delivery of a controlled substance); **People v. Adams**, 281 Ill.App.3d 339, 666 N.E.2d 769 (1st Dist. 1996) (in aggravated battery trial, admission of prior convictions for the same offense had minimal probative value and serious risk of prejudice); **People v. Pruitt**, 165 Ill.App.3d 947, 520 N.E.2d 867 (1st Dist. 1988) (the judge committed reversible error in permitting the State to impeach defendant, who was convicted of armed robbery and unlawful restraint, with his five-year-old guilty plea to armed robbery, aggravated kidnapping, rape, and deviate sexual assault; the State's closing argument, which admonished the jury to consider the evidence only as to defendant's credibility, caused the jury to focus its attention on the prior convictions and the possibility that defendant had once again committed the charged crimes).

People v. Ridley, 25 Ill.App.3d 596, 323 N.E.2d 577 (1st Dist. 1975) Defendant should be permitted to show that his prior conviction was by a guilty plea. See also, **People v. Reppa**, 104 Ill.App.3d 1123, 433 N.E.2d

1091 (1st Dist. 1982).

People v. Brown, 131 Ill.App.2d 5, 268 N.E.2d 202 (1st Dist. 1971) It was reversible error to impeach defendant with a prior court record of armed robbery, where in fact the prior conviction was merely for robbery.

People v. Johnson, 271 Ill.App.3d 962, 650 N.E.2d 1 (4th Dist. 1995) An "excited utterance" may not be impeached with evidence of the declarant's prior criminal convictions.

Cumulative Digest Case Summaries **§57-6(b)(4)(f)(1)**

People v. Averett & Tucker, 237 Ill.2d 1, 927 N.E.2d 1191 (2010)

1. Under **People v. Patrick**, 233 Ill.2d 62, 908 N.E.2d 1 (2009), the trial court abuses its discretion by deferring a ruling on a motion *in limine* to preclude impeachment by prior convictions until after the defendant testifies. In the rare case in which there is insufficient information to allow a pretrial ruling, the trial court may reserve its ruling but must set forth an adequate basis on the record. **Patrick** also held that a defendant who chooses not to testify because the trial court defers its ruling on a motion *in limine* waives review of the failure to make a timely ruling.

Here, the court held that the waiver holding of **Patrick** applies even where the trial court has a "blanket policy" of never ruling on a motion *in limine* until after the defendant has testified:

A. The failure to make a timely ruling on a motion *in limine* concerning prior convictions is not a "structural" error requiring automatic reversal. Only an error which renders a criminal trial fundamentally unfair or unreliable is deemed to be structural. Furthermore, if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption any other constitutional error is non-structural.

Although a trial court's "blanket policy" of refusing to make timely rulings on motions *in limine* constitutes "serious" error, it cannot be deemed structural error because it neither affects the framework of the trial nor precludes the possibility of a fair trial.

B. A blanket policy of deferring ruling on motions *in limine* to exclude prior convictions is not a constitutional error either because it deprives the defendant of the assistance of counsel or because it unconstitutionally burdens the right to testify. The court stressed that defendants who do not receive timely rulings on their motions to exclude prior convictions are not prevented from testifying, and must merely weigh the possibility of impeachment with several other factors in deciding whether to testify.

C. The trial court's blanket policy could not be reviewed under the plain error rule, because the defendant's failure to testify "goes beyond normal forfeiture" and deprives the court of a complete record. In particular, the reviewing court is required to speculate about several matters, including whether the trial court would have allowed impeachment with prior convictions, whether the prosecutor would have decided to use those convictions as impeachment, whether the State would have focused its argument on the prior convictions, the substance of defendant's testimony, and the questions the prosecution would have asked on cross-examination.

In a dissenting opinion, Justices Burke and Freeman stressed that **Patrick** is based on the premise that the failure to make a timely ruling on a motion *in limine* requires the defendant to decide whether to testify without being able to evaluate the impact that impeachment will have on his defense. Because the failure to make a timely ruling prejudices the defendant in deciding *whether* to testify, the dissenters found that reversible error occurs without regard to whether the defendant testifies.

2. The court rejected the argument that the refusal to consider the effect of the trial court's "blanket policy" violates Article I, §12 of the Illinois Constitution. Article I, §12 provides that "[e]very person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy,

property or reputation," and "shall obtain justice by law, freely, completely, and promptly."

The court concluded that Article I, §12 merely expresses a philosophy, and does not require a "certain remedy in any specific form."

3. See also **JURY**, §32-6(b).

(Defendant Averett was represented by former Assistant Defender Debra Loevy-Reyes, Chicago.)

(Defendant Tucker was represented by Assistant Defender Steven Becker, Chicago.)

People v. Mullins, 242 Ill.2d 1, 949 N.E.2d 611 (2011)

1. Under **People v. Montgomery**, 47 Ill.2d 510, 268 N.E.2d 695 (1971), a witness can be impeached with a prior conviction if the crime was punishable by death or imprisonment in excess of one year or involved dishonesty or false statement regardless of the punishment, unless the judge determines that the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice. Evidence is not admissible under this rule if more than 10 years have elapsed since the date of conviction or the release of the witness from confinement, whichever is later.

Several factors are relevant to balancing probative value and prejudicial effect, including the nature of the prior conviction, the nearness or remoteness of the conviction to the present charge, the subsequent career of the defendant, the length of the witness's criminal record, and whether the crime was similar to the one charged. The mere fact that a prior conviction is for the offense charged does not necessarily mean that its admission is error, especially when the jury is instructed concerning the limited use it may make of the prior conviction.

Here, the trial court did not err by admitting one of defendant's three prior convictions for possession of a controlled substance with intent to deliver, the same offense for which he was on trial. The trial court clearly performed the required balancing test although it failed to explicitly state it was doing so; the parties explicitly argued that the probative value of the three prior convictions was outweighed by their prejudice, the trial court asked the parties for precedent concerning the admission of crimes identical to the charge, and the court admitted only the most recent conviction.

2. Under **People v. Patrick**, 233 Ill.2d 62, 908 N.E.2d 1 (2009), it is error for the trial court to delay ruling on a motion *in limine* to exclude the defendant's prior convictions as impeachment, unless there is insufficient information to make a ruling before the defendant testifies. Under **Patrick** and **People v. Averett**, 237 Ill.2d 1, 927 N.E.2d 1191 (2010), such error can be harmless only if the State can show beyond a reasonable doubt that it did not affect the outcome of the proceeding. **Patrick** error is not "structural error," which requires reversal without application of the harmless error test.

One factor in determining whether **Patrick** error is harmless beyond a reasonable doubt is whether the defendant needs to testify in order to present a defense. Here, there were significant gaps in defendant's theory which could only be filled by his testimony. In other words, only defendant could have provided information about his actions between the times he was seen by other defense witnesses, and only he could explain his possession of currency in denominations different from those which his own witness claimed. In addition, there were no other occurrence witnesses for the defense.

However, other factors are to be considered in determining prejudice besides the defendant's need to testify. The court noted that the State did not argue that defendant's prior conviction meant that he had a propensity to commit the crime charged or that he was unbelievable simply because he had a prior conviction. Furthermore, the State's evidence was strong and consisted of the unimpeached testimony of three officers who observed defendant making controlled substance sales and who arrested defendant in possession of currency in denominations appropriate to the sales. Defendant admitted he was standing in the location the officers identified, and attempted to explain his presence "by linking together a long series of improbable coincidences and contradictory statements, while also leaving substantial gaps in his theory of the case." Furthermore, portions of defendant's testimony were contradicted by defense witnesses. In view of all of these factors, any error in delaying the ruling on the motion *in limine* was harmless beyond a reasonable doubt.

3. The court rejected the argument that the delay was prejudicial because during deliberations, the jurors asked for a copy of the stipulation regarding the prior conviction. The court concluded that it would be speculative to conclude that the request meant the jury relied on the prior conviction in deciding to convict in this case.

4. The court's opinion was written by Justice Freeman and joined by one justice (J. Burke). Two special concurring opinions disagreed on the role to be played by the need for defendant's testimony in determining whether the error was harmless.

Chief Justice Kilbride noted that he had written **People v. Patrick**, which he believed to hold that withholding a ruling on a motion *in limine* is more prejudicial where defendant's testimony is not necessarily required to present a defense, because the defendant is deprived of the opportunity to make an informed decision. By contrast, Justice Garman (joined by Justices Thomas, Karmeier and Theis), believed that a defendant who must testify if he is to have any chance of having the jury accept his version of events suffers greater prejudice if a ruling on his motion to exclude the convictions is delayed, because he is harmed if he does not testify, if he testifies and discloses the prior conviction without knowing what ruling the trial judge would have made, or if he testifies without disclosing the conviction and the trial court elects to admit it.

Defendant's conviction for possession of a controlled substance with intent to deliver was affirmed.

(Defendant was represented by Assistant Defender Jessica Arizo, Chicago.)

People v. Villa, 2011 IL 110777 (No. 110777, 12/1/11)

1. In **People v. Montgomery**, 47 Ill.2d 510, 268 N.E.2d 695 (1971), the Illinois Supreme Court adopted rules regulating the admission of prior convictions to impeach witnesses. Those rules included a provision that evidence of juvenile adjudications are generally not admissible, except in limited circumstances to impeach a witness other than an accused.

At the time of the adoption of the **Montgomery** rule, the Juvenile Court Act prohibited the admission of a juvenile adjudication against a minor except in subsequent proceedings under the Act concerning the same minor. Ill.Rev.Stat. 1965, Ch. 37, §702-9(1). The Act was subsequently amended to allow impeachment of a witness with a juvenile adjudication "pursuant to the rules of evidence for criminal trials," Ill.Rev.Stat. 1983, Ch. 37, §702-10(1)(c), which was interpreted to allow impeachment as provided by **Montgomery**. The Act now permits admission of juvenile adjudications for impeachment of witnesses "including the minor or defendant . . . pursuant to the rules of evidence for criminal trials." 705 ILCS 405/5-150(1)(c).

The Illinois Supreme Court found no conflict between §150(1)(c) and the **Montgomery** rule. Courts had interpreted the language "pursuant to the rules of evidence for criminal trials" in the Juvenile Court Act to incorporate the **Montgomery** rule. The legislature retained that language in the present statute, indicating that the present statute also incorporates **Montgomery**'s limitations. The statute's reference to a "minor or defendant" is not meaningless. It incorporates an existing case law exception to **Montgomery**, which allows introduction of a defendant's otherwise inadmissible criminal record where the defendant "opens the door" by attempting to mislead the trier of fact about his criminal background.

2. At trial, to explain why he falsely admitted guilt to the police, defendant testified that he was scared: "I've never been in a situation like this before. . . . they were saying that I was looking at prison time and stuff like that. I've never been in prison or nothing like that." Defendant admitted on cross-examination that he had given a typewritten statement to the police before, but testified that the situation was different because he had been 16 and was questioned as a juvenile.

The court concluded that defendant did not open the door to admission of his juvenile adjudication because he was not attempting to mislead the jury about his criminal background. At most, defendant's testimony implied that he had never been questioned by the police. Police questioning may occur in a variety of circumstances and is not necessarily indicative of a criminal background. Thus, defendant opened the door only to questioning about his prior experience with police questioning, not to his prior criminal history. Although defendant also stated he had never been in prison, this was a truthful statement.

3. The error was not harmless. Only defendant's statement to the police implicated him in the

offense. Other evidence only proved his motive to commit the offense. The prosecutor made multiple references to the juvenile adjudication in argument to the jury, urging the jury that it supplied a basis to find defendant's testimony was not truthful.

(Defendant was represented by Assistant Deputy Defender Paul Glaser, Elgin.)

People v. Knox, 2014 IL App (1st) 120349 (No. 1-12-0349, 9/30/14)

1. Under **People v. Montgomery**, 47 Ill.2d 510, 268 N.E.2d 695 (1971), a prior conviction is admissible as impeachment if: (1) the conviction was for a crime that was punishable by death or a term of imprisonment in excess of one year or which involved dishonesty or false statements, (2) less than 10 years has elapsed since the date of the prior conviction or the release of the convicted person from confinement (whichever is later), and (3) the probative value of the prior conviction outweighs the danger of unfair prejudice. The 10-year requirement is based on the belief that a decade of conviction-free living demonstrates sufficient rehabilitation of the witness's credibility to attenuate the probative value of the prior conviction as impeachment. The 10-year period is a requirement for admission of the prior conviction, and is not left to the trial court's discretion.

2. However, where there is evidence that a defendant is intentionally drawing out legal proceedings, the 10-year time limit may be tolled on the ground that an effort to manipulate the judicial system negates the positive inference that is generally drawn from the fact that the defendant has not violated the law for a decade.

3. Similarly, fundamental fairness requires that a prior conviction be admitted as impeachment at a second trial where the original trial occurred within the 10-year period, but the conviction was reversed and the cause remanded for a new trial which occurs outside the 10-year period. In such cases, the prior conviction should be admitted on the same terms as it would have been admitted at the original trial.

4. Here, the trial court properly admitted defendant's prior felony convictions which occurred more than 10 years before the date of the trial. Defendant was convicted of first degree murder in a jury trial in 2006. That trial occurred within the 10-year period for admission of defendant's prior convictions, and convictions were admitted as impeachment.

However, the Appellate Court ordered a new trial because the trial judge declined to make a pretrial ruling on defendant's motion *in limine* to exclude use of the prior convictions as impeachment. The second trial occurred in 2010, more than 10 years after the prior convictions occurred.

Citing fundamental fairness, the Appellate Court held that prior convictions were properly admitted at defendant's second trial because the original trial satisfied the 10-year-rule. Defendant's conviction was affirmed.

(Defendant was represented by Assistant Defender Jennifer Bontrager, Chicago.)

People v. Lampley, 405 Ill.App.3d 1, 939 N.E.2d 525 (1st Dist. 2010)

Under **People v. Patrick**, 233 Ill.2d 62, 908 N.E.2d 1 (2009), the trial judge errs by failing to make a pretrial ruling on a motion *in limine* concerning the admissibility of prior convictions as impeachment, at least where the court has sufficient information to make a ruling before trial. In **Patrick**, the trial judge followed a blanket policy of refusing to rule on the admissibility of prior convictions until after the defendant testified.

The Appellate Court found that no abuse of discretion occurred where the trial court did not follow a blanket policy, the parties did not "develop arguments" concerning the information before the trial judge when the motion *in limine* was filed, and the judge issued a ruling at the close of the State's case, before defendant was required to decide whether to testify. The court acknowledged, however, that the preferred practice is to either: (1) rule on the admissibility of prior convictions before trial, or (2) make a record of the compelling facts which necessitate deferral of the ruling.

In the alternative, because the defendant had the benefit of the ruling when deciding whether to testify, any error was not so serious as to constitute plain error under the second prong of the plain error test.

(Defendant was represented by Assistant Defender Jessica Arizo, Chicago.)

People v. McCoy, 2016 IL App (1st) 130988 (No. 1-13-0988, 9/15/16)

1. It is improper for the State to question a witness for purposes of impeachment unless it is prepared to offer proof of the impeaching information. In other words, the State must possess a good-faith basis for cross-examination questions as well as the intent and ability to complete the impeachment.

At defendant's murder trial, the prosecution erred in cross-examining defendant where it asked whether defendant had threatened to kill the decedent's family if decedent said anything about defendant having been at the scene. There was nothing in the record to suggest that the State had the intent or ability to complete the impeachment by showing that defendant had made such a threat. Although the decedent made several statements to first responders before he died, there was no evidence to suggest that he told anyone that defendant threatened to kill his family. "In short, there was simply no evidence whatsoever to support the State's question."

The court concluded that the error was not harmless. Because there were no witnesses to the actual shooting and defendant offered an explanation for his presence in the decedent's car, the jury's verdict rested primarily on whether it found defendant's testimony to be credible. In addition, when defendant denied making the threat the State's Attorney implied that defendant was lying. The court also noted that the nature of the State's accusation "was so outrageous that it colored the entire trial."

2. A prior conviction is admissible to attack a witness's credibility where the prior crime: (1) was punishable by death or imprisonment of more than a year or involved dishonesty or a false statement, (2) was less than 10 years old or the witness was released from confinement within the last 10 years, and (3) has sufficient probative value to outweigh any danger of unfair prejudice. The trial court should consider, among other things, the nature of the prior conviction, the length of the witness's criminal record, the witness's age and circumstances, and the extent to which it is more important for the jury to hear defendant's story than to learn of a prior conviction. Although a prior conviction need not be excluded merely because it was for a similar crime to that for which the defendant is on trial, the trial court should be cautious in admitting such convictions.

Here, the trial court abused its discretion by admitting a prior attempt murder conviction at defendant's trial for murder. Not only was the prior conviction nearly identical to the crime charged, but in closing argument the prosecutor repeatedly encouraged the jury to focus on the prior conviction rather than the charge. Because the prejudicial effect of the prior conviction outweighed its probative value, admission of the evidence constituted error.

Defendant's conviction for murder was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Rebecca Cohen, Chicago.)

People v. Melton, 2013 IL App (1st) 060039 (No. 1-06-0039, 2/8/13)

Where the trial court has sufficient information to make a ruling before trial, it is error to refuse to make a pretrial ruling on a motion *in limine* concerning the admissibility of prior convictions. By contrast, a pretrial ruling need not be made if the trial court lacks all of the information needed to decide the motion. In such cases, however, the trial court must articulate a sufficient basis to support the delay in ruling on the motion.

1. Here, the lower court erred by failing to make a pretrial ruling on defendant's motion *in limine* concerning the admissibility of his prior convictions. The court offered no reason for failing to make a pretrial ruling, and the record does not suggest that the defendant's testimony was necessary before a ruling could be made.

2. However, error was harmless in these circumstances. Under **People v. Mullins**, 242 Ill. 2d 1, 949 N.E.2d 611 (2011), three factors are to be considered in determining whether plain error resulted from delaying the ruling on a motion *in limine* to exclude prior convictions. The factors include: (1) the defendant's need to testify, (2) whether the parties mentioned the prior convictions in argument, and (3) the strength of the evidence against the defendant.

Because the evidence was overwhelming and the parties did not mention the defendant's conviction while addressing the jury, the court concluded that the same result would have occurred absent the error. The court declined to consider defendant's need to testify, noting that the parties disagreed whether this factor should weigh for or against a finding of harmlessness. The court held that even if it accepted defendant's argument that the error was more serious because there were means other than testifying by which he could present his defense, that factor was not sufficient to affect the holding of harmless error.

Defendant's conviction for possession of a controlled substance was affirmed.

(Defendant was represented by Assistant Defender Pamela Rubeo, Chicago.)

People v. Sanchez, 404 Ill.App.3d 15, 935 N.E.2d 1099 (1st Dist. 2010)

Evidence of a prior conviction is not admissible to impeach the testimony of a witness "if a period of more than ten years has elapsed since the date of conviction or of the release of the witness from confinement, whichever is the later date." **People v. Montgomery**, 47 Ill.2d 510, 516, 268 N.E.2d 695 (1971).

Taking judicial notice of the public records of the Department of Corrections, the Appellate Court determined that in November 1997, defendant was released from prison on a prior conviction admitted to impeach his trial testimony, and completed MSR on that conviction in November 1999. Defendant testified in May 2008.

Because more than ten years had elapsed between the dates of defendant's release from prison and his trial, the prior conviction was not admissible to impeach his trial testimony. The court rejected the State's argument that defendant was not released from "confinement" until he completed MSR. Prior decisions hold that parole is not included in the ten-year calculation, and MSR substitutes for parole.

(Defendant was represented by Assistant Defender Jonathan Krieger, Chicago.)

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§57-6(b)(4)(f)(2)
Evidence's Probative Value Versus Its Prejudicial Effect

People v. Williams, 161 Ill.2d 1, 641 N.E.2d 296 (1994) The judge erred in denying defendant's motion to prevent the State from impeaching defendant with a four-year-old voluntary manslaughter conviction on grounds that the conviction was "of great probative value in a case of this nature," because the judge did not adequately weigh the evidence's probative value against its prejudicial effect. Not all felony convictions are relevant to credibility because they exhibit disrespect for societal order or show defendant's disposition to "place self-interest ahead of the interest of society." The judge's remarks suggested that the prior conviction was admissible on the question of guilt and not for its relationship to defendant's credibility. But, the error was harmless. See **People v. Williams**, 173 Ill.2d 48, 670 N.E.2d 638 (1996) (Williams should be construed only as stressing the balancing requirement and not as eliminating the admissibility of prior felony convictions that do not involve dishonesty or false statement).

People v. McKibbins, 96 Ill.2d 176, 449 N.E.2d 821 (1983) The trial court did not abuse its discretion by admitting, for impeachment purposes, defendant's prior 20 theft convictions (mostly misdemeanors) where defendant's conduct demonstrated a pattern of dishonesty and the probative value of the evidence outweighed any potential prejudicial impact. The State had the right and the obligation to use all of the impeaching evidence it possessed in order to destroy defendant's credibility if he were to testify.

People v. DeHoyos, 64 Ill.2d 128, 355 N.E.2d 19 (1976) Where the State elicited from its own rebuttal witness testimony not limited to prior conviction, but also included the sentence and the fact that the witness

served all of it, the testimony was improper and, in terms of defendant's testimony that he sought this witness's advice regarding the police, the evidence's prejudicial effect outweighed its probative value. See also, **People v. Pruitt**, 165 Ill.App.3d 947, 520 N.E.2d 867 (1st Dist. 1988) (it was improper for the State to indicate the sentence defendant received on the prior convictions, but defendant was not prejudiced in that regard).

People v. Whirl, 351 Ill.App.3d 464, 814 N.E.2d 872 (2d Dist. 2004) 1. In balancing probative value and prejudicial effect, the trial court must consider the nature of the prior crime, the length of defendant's criminal record, the age and circumstances of defendant, and the extent to which the search for truth will be served by obtaining testimony which may not be forthcoming if impeachment is permitted. The trial court must not apply the balancing test mechanically. The record must indicate that the trial court was aware of its discretion to exclude a prior conviction.

2. Here, the court completely abdicated its role in balancing probative value and prejudicial effect where it merely noted that defendant's prior convictions were within 10 years of trial and that defendant's entire criminal history was "fair game." See also, **People v. McGee**, 286 Ill.App.3d 786, 676 N.E.2d 1341 (1st Dist. 1997) (the trial court failed to comply with the requirements of Montgomery where its "balancing" consisted solely of determining that the prior convictions were not similar to the charges being tried); **People v. Jennings**, 279 Ill.App.3d 406, 664 N.E.2d 699 (4th Dist. 1996) (the trial court erred by admitting an armed robbery conviction as impeachment where the record suggested that the court did not understand its obligation to weigh the prejudicial effect of the prior conviction against its probative value before admitting it and, instead, believed that any prior conviction for a crime involving dishonesty was automatically admissible as impeachment); People v. Smith, 73 Ill.App.3d 577, 392 N.E.2d 347 (5th Dist. 1979) (trial judge's comments indicated that he believed he had no discretion about admitting defendant's prior conviction).

People v. Elliott, 274 Ill.App.3d 901, 654 N.E.2d 636 (1st Dist. 1995) 1. In conducting the balancing test, the trial court must reject "any notions of disrespect for societal order or inclination to place self-interest ahead of the interests of society."

2. The court may not consider the effect of a limiting instruction when balancing probative value against prejudice; while such an instruction must be given if the impeachment is allowed, it is not relevant to the balancing test.

People v. Carradine, 114 Ill.App.3d 82, 448 N.E.2d 569 (1st Dist. 1983) After defendant testified on direct examination that he told the state's attorney before trial (when questioned about the incident) that he had never "been locked up before," the State brought out on cross examination defendant's prior arrests for battery, burglary, and rape. The trial court prohibited the defense from establishing that defendant had not been tried or convicted of any of the prior crimes. During closing argument, the prosecutor referenced the prior arrests, stating that they were evidence that defendant had been dishonest in saying that he had never been locked up.

However, here, the term "locked up" connotes a conviction. The use of such ambiguous language, coupled with the trial court's failure to allow defendant to explain his prior arrests or give a limiting instruction to the jury, far outweighed the probative value of the evidence.

People v. Smith, 105 Ill.App.3d 84, 433 N.E.2d 1054 (1st Dist. 1982) In conducting the balancing test, a trial court should consider the witness's interests. Impeaching a State witness with a prior conviction affects only the witness's credibility. When a defendant is impeached with a prior conviction, the jury may consider his prior conviction in determining his guilt or innocence. See also, **People v. Walker**, 157 Ill.App.3d 133, 510 N.E.2d 29 (1st Dist. 1987).

People v. Harden, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2011) (No. 1-09-2309, 6/7/11)

A defendant who testifies may be impeached by a prior conviction if (1) the prior crime was punishable by death or imprisonment of more than one year, or involved dishonesty or false statement regardless of the punishment; (2) less than 10 years have passed since the date of the conviction of the prior crime or the release of the witness from confinement, whichever is later; and (3) the probative value of admitting the prior conviction outweighs the potential for unfair prejudice. **People v. Montgomery**, 47 Ill.2d 510, 268 N.E.2d 695 (1971). A conviction may be used for impeachment if it is punishable by death or imprisonment of more than one year, regardless of whether the nature of the conviction bears on the witness's truthfulness.

In determining whether the probative value outweighs the prejudicial effect, the trial court must take into account: (1) the nature of the prior crime; (2) the proximity or remoteness in time of the past conviction to the present time; and (3) the similarity of the prior crime to the one charged. The mere fact that the prior conviction is for an offense identical to the charged offense does not preclude its use as impeachment. Whether to admit a prior conviction is a matter entrusted to the discretion of the trial judge.

The trial judge did not abuse his discretion in allowing impeachment of defendant with a conviction for possession of a controlled substance with intent to deliver, even though that conviction was identical to the charged offense, and the defendant had an additional conviction for PSMV that could have alternatively been used for impeachment. Although the judge did not articulate how he balanced the probative value of the prior conviction with its prejudicial effect, he acknowledged the requirement that he perform that test. Therefore, there was no reason to believe that the judge disregarded the **Montgomery** standard.

(Defendant was represented by Assistant Defender Deborah Pugh, Chicago.)

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§57-6(b)(4)(f)(3)
Qualifying and Non-Qualifying Convictions

Knowles v. Panopoulos, 66 Ill.2d 585, 363 N.E.2d 805 (1977) A witness may not be impeached with a criminal trespass to vehicle conviction, because it is not a felony or a crime of dishonesty or false statement. Accord, **People v. Schuning**, 106 Ill.2d 41, 476 N.E.2d 423 (1985).

People v. Spates, 77 Ill.2d 193, 395 N.E.2d 563 (1979) Any misdemeanor (such as theft) "which has as its basis lying, cheating, deceiving or stealing, bears a reasonable relation to testimonial deceit and should be admissible for impeachment purposes." But, the trial court can still refuse to admit evidence of a conviction for a misdemeanor after weighing the probative value of a conviction against the potential for unfair prejudice. The factors to consider include the nature of the crime, the nearness or remoteness in time of the conviction to the present trial, the subsequent career of the person, and whether the crime was similar to the one charged. Here, the court correctly allowed use of defendant's prior misdemeanor convictions.

People v. Schuning, 106 Ill.2d 41, 476 N.E.2d 423 (1985) "The successful completion of a period of supervision does not result in a conviction and therefore is not a proper basis for impeachment." The error was prejudicial at a trial for rape where defendant raised the defense of consent and his credibility was crucial.

People v. Malone, 78 Ill.2d 34, 397 N.E.2d 1377 (1979) The judge did not error in allowing the State to

impeach defendant with two prior misdemeanor convictions obtained under names other than Malone where the State presented evidence to the jury that defendant was the subject of those convictions. Although it may have been preferable for the judge to take this evidence in camera, reversible error did not occur because the identity was clearly established and the State was allowed to elicit only testimony that was necessary to establish identity.

People v. Stover, 89 Ill.2d 187, 432 N.E.2d 262 (1982) The State improperly impeached a defense witness with his guilty plea to resisting a police officer (the same offense for which defendant was on trial) and referencing the guilty plea during closing argument where the conviction for resisting a police officer was neither a felony nor involved dishonesty. See also, **People v. Slabaugh**, 323 Ill.App.3d 723, 753 N.E.2d 1170 (2d Dist. 2001).

Also, the Court rejected the State's claim that Montgomery was inapplicable because the guilty plea had relevance independent of its use as a prior conviction, i.e., it was admissible for impeachment as a prior inconsistent statement. A guilty plea that is inadmissible under **Montgomery** may not be introduced as a prior inconsistent statement — the State should not be allowed to circumvent **Montgomery** by labeling a guilty plea as evidence of a prior inconsistent statement.

People v. Shook, 35 Ill.2d 597, 221 N.E.2d 290 (1966) It was reversible error to impeach defendant with a prior conviction that had been set aside in habeas corpus proceedings.

People v. Reddick, 123 Ill.2d 184, 526 N.E.2d 141 (1988) At defendant's first trial, evidence of a State witness's prior conviction for armed robbery was admissible. By the time of retrial (defendant was granted a new trial on an unrelated ground), more than 10 years had elapsed since the witness's release from prison on the armed robbery conviction. If the evidence was admissible at defendant's first trial, it must also be admitted on retrial. "[The witness] will likely be attempting to track his prior testimony, and fundamental fairness dictates that defendant be allowed to impeach him in the same manner that defendant should have been permitted to impeach him in the initial trial."

People v. Yost, 78 Ill.2d 292, 399 N.E.2d 1283 (1980) It was reversible error for the State to impeach defendant with an 11-year-old Michigan conviction for which he was sentenced to two to four years where more than 10 years had elapsed since the Michigan conviction and the State failed to show that defendant had been released from confinement for that conviction within the past 10 years.

The Court rejected the State's contention that where defendant received a two to four year sentence 11 years previously, it should be presumed that he was released within the past 10 years. "A court should not presume confinement or the date of a release from confinement. The party seeking to impeach testimony has the responsibility of presenting proper evidence of an impeaching conviction." See also, **People v. Strange**, 125 Ill.App.3d 43, 465 N.E.2d 616 (1st Dist. 1984).

People v. Warmack, 83 Ill.2d 112, 413 N.E.2d 1254 (1980) The trial court properly prohibited defendant from impeaching a State witness with an 11-year-old attempt armed robbery conviction for which the witness had been sentenced to probation where the prior conviction was more than 10 years old and did not result in confinement. See also, **People v. Stewart**, 54 Ill.App.3d 76, 369 N.E.2d 131 (1st Dist. 1977).

People v. Massie, 137 Ill.App.3d 723, 484 N.E.2d 1213 (2d Dist. 1985) Under Montgomery, adjudications of delinquency may not be introduced to impeach a defendant. The use of juvenile adjudications is limited to the impeachment of a witness other than the accused.

People v. Harden, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2011) (No. 1-09-2309, 6/7/11)

A defendant who testifies may be impeached by a prior conviction if (1) the prior crime was punishable by death or imprisonment of more than one year, or involved dishonesty or false statement regardless of the punishment; (2) less than 10 years have passed since the date of the conviction of the prior crime or the release of the witness from confinement, whichever is later; and (3) the probative value of admitting the prior conviction outweighs the potential for unfair prejudice. **People v. Montgomery**, 47 Ill.2d 510, 268 N.E.2d 695 (1971). A conviction may be used for impeachment if it is punishable by death or imprisonment of more than one year, regardless of whether the nature of the conviction bears on the witness's truthfulness.

In determining whether the probative value outweighs the prejudicial effect, the trial court must take into account: (1) the nature of the prior crime; (2) the proximity or remoteness in time of the past conviction to the present time; and (3) the similarity of the prior crime to the one charged. The mere fact that the prior conviction is for an offense identical to the charged offense does not preclude its use as impeachment. Whether to admit a prior conviction is a matter entrusted to the discretion of the trial judge.

The trial judge did not abuse his discretion in allowing impeachment of defendant with a conviction for possession of a controlled substance with intent to deliver, even though that conviction was identical to the charged offense, and the defendant had an additional conviction for PSMV that could have alternatively been used for impeachment. Although the judge did not articulate how he balanced the probative value of the prior conviction with its prejudicial effect, he acknowledged the requirement that he perform that test. Therefore, there was no reason to believe that the judge disregarded the **Montgomery** standard.

(Defendant was represented by Assistant Defender Deborah Pugh, Chicago.)

People v. Salem, 2016 IL App (3d) 120390 (No. 3-12-0390, 3/21/16)

The State improperly impeached defendant with proof of his guilty plea because the plea had not yet resulted in a sentence and final judgment of conviction. While a guilty plea is an admission of guilt, it does not become a final judgment of conviction until the court imposes a sentence.

Although defendant did not object to the error, the improper admission of this evidence along with other prior convictions that were inadmissible because they were over 10 years old constituted second prong plain error since it "was so egregious that it eroded the integrity of the judicial process and rendered defendant's trial fundamentally unfair."

(Defendant was represented by Assistant Defender Jay Wiegman, Ottawa.)

People v. Sanchez, 404 Ill.App.3d 15, 935 N.E.2d 1099 (1st Dist. 2010)

Evidence of a prior conviction is not admissible to impeach the testimony of a witness "if a period of more than ten years has elapsed since the date of conviction or of the release of the witness from confinement, whichever is the later date." **People v. Montgomery**, 47 Ill.2d 510, 516, 268 N.E.2d 695 (1971).

Taking judicial notice of the public records of the Department of Corrections, the Appellate Court determined that in November 1997, defendant was released from prison on a prior conviction admitted to impeach his trial testimony, and completed MSR on that conviction in November 1999. Defendant testified in May 2008.

Because more than ten years had elapsed between the dates of defendant's release from prison and his trial, the prior conviction was not admissible to impeach his trial testimony. The court rejected the State's argument that defendant was not released from "confinement" until he completed MSR. Prior decisions hold that parole is not included in the ten-year calculation, and MSR substitutes for parole.

(Defendant was represented by Assistant Defender Jonathan Krieger, Chicago.)

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§57-6(b)(4)(f)(4)
Proper Method of Impeachment

People v. Flynn, 8 Ill.2d 116, 133 N.E.2d 257 (1956) It is improper to cross-examine a defendant concerning his prior conviction. The proper manner of impeaching a criminal defendant is by offering the record of the conviction or an authenticated copy thereof. However, a witness other than a defendant may be cross-examined about his own prior conviction. See also, **People v. Bey**, 42 Ill.2d 139, 246 N.E.2d 287 (1969); **People v. Nelson**, 275 Ill.App.3d 877, 656 N.E.2d 1110 (3d Dist. 1995) (cross-examining defendant about prior offenses creates extreme prejudice by forcing him to testify about his prior convictions; prejudicial error occurred where the prosecutor asked defendant whether he had been convicted of a felony); **People v. Depper**, 256 Ill.App.3d 179, 629 N.E.2d 699 (4th Dist. 1994) (the prosecutor committed reversible error by questioning defendant about his prior convictions; the prosecutor did not obtain certified copies of the prior convictions but instead forced defendant to admit the prior convictions in front of the jury).

People v. Atkinson, 186 Ill.2d 450, 713 N.E.2d 532 (1999) Illinois law does not authorize the "mere-fact" method of impeachment with prior convictions, under which the jury is informed that defendant was previously convicted of a felony but is not told the nature of that conviction. Because the "mere fact" method deprives the jury of knowledge of the nature of the past conviction, it "undermines the **Montgomery** rule and inhibits the jury's evaluation" of credibility. Also, the "mere fact" method might prejudice a defendant because, in the absence of any evidence of the nature of the prior conviction, "[t]here is a potential danger that the jury would speculate that the defendant was previously convicted of a more serious crime." See also, **People v. Cox**, 195 Ill.2d 378, 748 N.E.2d 166 (2001) (the court does not have discretion to utilize the "mere-fact" method; error occurred where defendant moved to bar any consideration of his prior convictions as impeachment, and the court ruled that the "mere fact" method would be used; the court declined to decide whether an appellant who requests or agrees to the mere-fact method waives any challenge); **People v. Harvey**, 211 Ill.2d 368, 813 N.E.2d 181 (2004) (mere-fact method of impeachment did not constitute plain error); **People v. Brown**, 334 Ill.App.3d 854, 779 N.E.2d 418 (1st Dist. 2002) (the judge erred by utilizing the "mere-fact" method of impeachment; defendant did not forfeit this issue by agreeing to the mere-fact method where counsel did not truly accept the judge's decision to use the mere-fact method).

People v. Dudley, 217 Ill.App.3d 230, 576 N.E.2d 1110 (5th Dist. 1991) When impeaching defendant with prior convictions for aggravated battery and escape, the State should not have been allowed to introduce documents including the aggravated battery information (stating that defendant used a knife to intentionally stab the victim in the back) and docket sheets showing that 13 separate charges had been dismissed in exchange for the pleas. This information was surplusage, irrelevant, and prejudicial. Proof of defendant's prior convictions should have been "accomplished by introduction of a certified copy of the judgment order, with any irrelevant information excised."

People v. Halcomb, 176 Ill.App.3d 100, 530 N.E.2d 1074 (1st Dist. 1988) The prosecutor's accusations on cross-examination of defendant that defendant was dismissed from the Navy for committing larceny was improper and prejudicial because the record failed to show any military adjudication which could be considered as a conviction for larceny. Further, even if the military charge did result in the equivalent of a conviction, the form of the prosecutor's introduction of the charge was improper and prejudicial, for, instead of offering the record of his conviction, the prosecutor asked defendant if he had been discharged for taking billfolds. "There is no question more damaging to a defendant with a jury than one which suggests or intimates that he is a criminal or has been charged with criminal offenses. Such damage is magnified twofold when it is elicited from a defendant on cross-examination and he is compelled to testify against himself." (**People v. Kosearas**, 408 Ill. 179, 181, 96 N.E.2d 539 (1951). Even where the record of a conviction is properly introduced for impeachment purposes, a defendant cannot be cross-examined about the crime.

People v. Pitts, 257 Ill.App.3d 949, 629 N.E.2d 770 (4th Dist. 1994) The court erred by admitting certified copies of defendant's prior convictions because, once defendant conceded that he had two or three prior convictions for retail theft, there was no need for any further clarification or impeachment.

Cumulative Digest Case Summaries **§57-6(b)(4)(f)(4)**

People v. Anderson, 407 Ill.App.3d 662, 944 N.E.2d 359 (1st Dist. 2011)

To impeach a defendant with a prior conviction, the State must introduce a certified copy of the record of conviction. It is error to include in the copy irrelevant information such as counts on which convictions were not entered or the sentence which the defendant received. The inclusion of irrelevant details may be so prejudicial as require a new trial.

The court concluded that the trial judge erred at a trial for residential burglary by admitting a certified copy of defendant's prior convictions which referred to the sentences imposed, allegations that defendant caused injury and great bodily harm, and the fact that defendant was charged with nine counts but convicted of only seven. Because the evidence was not closely balanced, however, the court concluded that the plain error rule did not apply.

The court noted that the jury was not faced with resolving alternative, credible versions of the charged offense, defendant gave conflicting statements, defendant was in possession of property taken from the residence, and defendant offered to help the occupants recover their property if they agreed not to call the police.

(Defendant was represented by Assistant Defender Bryon Reina, Chicago.)

People v. McCoy, 2016 IL App (1st) 130988 (No. 1-13-0988, 9/15/16)

1. It is improper for the State to question a witness for purposes of impeachment unless it is prepared to offer proof of the impeaching information. In other words, the State must possess a good-faith basis for cross-examination questions as well as the intent and ability to complete the impeachment.

At defendant's murder trial, the prosecution erred in cross-examining defendant where it asked whether defendant had threatened to kill the decedent's family if decedent said anything about defendant having been at the scene. There was nothing in the record to suggest that the State had the intent or ability to complete the impeachment by showing that defendant had made such a threat. Although the decedent made several statements to first responders before he died, there was no evidence to suggest that he told anyone that defendant threatened to kill his family. "In short, there was simply no evidence whatsoever to support the State's question."

The court concluded that the error was not harmless. Because there were no witnesses to the actual shooting and defendant offered an explanation for his presence in the decedent's car, the jury's verdict rested primarily on whether it found defendant's testimony to be credible. In addition, when defendant denied making the threat the State's Attorney implied that defendant was lying. The court also noted that the nature of the State's accusation "was so outrageous that it colored the entire trial."

2. A prior conviction is admissible to attack a witness's credibility where the prior crime: (1) was punishable by death or imprisonment of more than a year or involved dishonesty or a false statement, (2) was less than 10 years old or the witness was released from confinement within the last 10 years, and (3) has sufficient probative value to outweigh any danger of unfair prejudice. The trial court should consider, among other things, the nature of the prior conviction, the length of the witness's criminal record, the witness's age and circumstances, and the extent to which it is more important for the jury to hear defendant's story than to learn of a prior conviction. Although a prior conviction need not be excluded merely because it was for a similar crime to that for which the defendant is on trial, the trial court should be cautious in admitting such convictions.

Here, the trial court abused its discretion by admitting a prior attempt murder conviction at defendant's trial for murder. Not only was the prior conviction nearly identical to the crime charged, but in closing argument the prosecutor repeatedly encouraged the jury to focus on the prior conviction rather than the charge. Because the prejudicial effect of the prior conviction outweighed its probative value, admission of the evidence constituted error.

Defendant's conviction for murder was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Rebecca Cohen, Chicago.)

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§57-6(b)(4)(g)
Pending Arrests and Charges

Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) Defendant's confrontation rights were violated by the trial judge's refusal to allow counsel to cross-examine a State witness about the fact that charges against him had been dismissed. The inquiry concerned the witness's possible bias, and may have supplied a motive for favoring the State in his testimony.

People v. Triplett, 108 Ill.2d 463, 485 N.E.2d 9 (1985) 1. That a witness had been arrested or charged with a crime may be shown or inquired into where it would reasonably tend to show that his or her testimony might be influenced by interest, bias, or a motive to testify falsely.

2. It is immaterial whether the arrests or charges involve the same occurrence for which defendant is on trial.

3. The evidence used "must give rise to the inference that the witness has something to gain or lose by his testimony and, therefore, the evidence used must not be remote or uncertain." **People v. Sims**, 192 Ill.2d 592, 736 N.E.2d 1048 (2000).

4. Defendant need not show before cross-examining the witness that any promises of leniency have been made or any expectation of special favor exists in the mind of the witness. See also, **People v. Freeman**, 100 Ill.App.3d 478, 426 N.E.2d 965 (2d Dist. 1981).

5. Defense counsel is "entitled to inquire into such promises or expectations whether based on fact or imaginary."

Defendant was denied his right to confrontation where he was barred from questioning a witness regarding juvenile delinquency petitions that could have been reinstated against the witness at the time of defendant's trial. See also, **People v. Harris**, 123 Ill.2d 113, 526 N.E.2d 335 (1988); **People v. Hayes**, 183 Ill.App.3d 752, 539 N.E.2d 355 (1st Dist. 1989).

People v. Sims, 192 Ill.2d 592, 736 N.E.2d 1048 (2000) The evidence must be "timely, unequivocal, and directly related." Here, the judge properly excluded impeachment that during the time period in which DNA testing for this case was performed, the State Police crime laboratory technician who performed the testing was under investigation for stealing microscopes from the lab. Any alleged incentive to fabricate DNA evidence because of the disciplinary proceedings was remote and uncertain. See also, **People v. Bull**, 185 Ill.2d 179, 705 N.E.2d 824 (1998).

People v. Wilkerson, 87 Ill.2d 151, 429 N.E.2d 526 (1981) The trial court committed reversible error in prohibiting the defense from establishing that one of the State's witnesses, who was also involved in the offense, had pending theft and welfare charges. The witness denied receiving any promises of leniency from the prosecutor, and said that the prosecutor had told her that he would be in touch with her and her attorney after the **Wilkerson** case was completed to "try to work something out." The charges were being held until

the trial was completed. Defendants should have been allowed to present the theory that the witness was incredible because she was being rewarded for her testimony, a conclusion the jury could have reasonably made despite the witness's protestations to the contrary. But see, **People v. Eddington**, 77 Ill.2d 41, 394 N.E.2d 1185 (1979) (the trial judge did not abuse his discretion by keeping the pending charges of the witness from the jury because the pending charges could not reasonably have affected the witness's bias, motive, or willingness to testify).

People v. Griffin, 109 Ill.2d 293, 487 N.E.2d 599 (1985) The Court rejected defendant's contention that a State's key witness testified untruthfully where the witness's testimony (that he did not have any negotiations regarding his pending case and that he had not talked with his attorney about the case's disposition) did not conflict with the prosecutor's testimony (that he had told the witness's attorney that the State would observe the witness's testimony at trial and evaluate that "cooperation" at the witness's trial) and, thus, was not misleading.

People v. Owens, 102 Ill.2d 88, 464 N.E.2d 261 (1984) The trial court's ruling allowing defendant to establish that a State's witness had been arrested for burglary but barring defendant from showing that the witness was armed when he was arrested did not constitute reversible error. If the witness knew that the State could have charged him with a more serious offense (because he was armed) and, thus, was inclined to testify favorably for the State, defendant suffered no real prejudice where the jury heard evidence of the witness's potential bias (such as that he thought his testimony would help the case) and ample impeachment evidence was presented from which the jury could judge the witness's credibility. Thus, the error, if any, in limiting cross-examination was harmless.

People v. Balayants, 343 Ill.App.3d 602, 798 N.E.2d 826 (2d Dist. 2003) The trial judge's decision to bar evidence of pending charges will not be disturbed absent an abuse of discretion. Here, the trial court abused its discretion in a robbery trial by refusing to allow the defense to show that the complainant had a pending aggravated robbery charge and was in jail at the time of defendant's trial. At the hearing on the State's motion *in limine* to bar such evidence, the complainant said he would do whatever he could to avoid going to prison. Also, the witness's attorney stated that he would welcome a plea offer from the prosecutor. Although such evidence did not reveal "an absolute expectation of leniency," it provided a basis for the jury to decide whether the pending charges provided a motive for false testimony.

People v. Hughes, 168 Ill.App.3d 758, 522 N.E.2d 1275 (1st Dist. 1988) The court erred in allowing the State to impeach a defense witness by showing that criminal charges were pending against the witness where there was no advantage that the witness could gain by perjuring himself in this case. Illinois courts have viewed pending charges as establishing a witness's motive to curry favor with the prosecution by testifying falsely on the State's behalf. Anti-prosecution antagonism resulting solely from the pendency of criminal charges is insufficient to allow impeachment of a defense witness by introduction of those charges.

People v. Paisley, 149 Ill.App.3d 556, 500 N.E.2d 96 (2d Dist. 1986) The trial court committed reversible error by preluding defendant from eliciting that a State's key witness had a pending charge, on grounds that defendant was charged with the same offense (and there was a danger that defendant's involvement in the case would be brought out) and the witness testified in chambers that he had not negotiated with the State. The court's concern that the evidence would allow questioning as to defendant's pending charge is not understandable, for the court could have restricted the testimony and cross-examination to prevent any mention that defendant was facing the same charge as the witness.

People v. Rogers, 42 Ill.App.3d 499, 356 N.E.2d 413 (3d Dist. 1976) The attorney-client privilege does not prevent defendant from establishing whether promises of leniency have been made to a State's witness. Here,

the court precluded defendant from asking the State witness what her attorney had represented would happen to her on her pending charges (the defense had established that the witness had been offered favorable treatment but the witness denied that any promise had been made). The court remanded the cause for a hearing, and if the communications between the prosecutor and the witness's attorney engendered even a suggestion of cooperation in exchange for the witness's testimony, defendant would be entitled to examine the witness and her attorney in the presence of the jury.

People v. Foley, 109 Ill.App.3d 1010, 441 N.E.2d 655 (2d Dist. 1982) The judge committed reversible error by precluding defendant from establishing that a State witness (who testified that he and defendant committed the crime, that the prosecution made no promises to him in exchange for his testimony, and that he had pleaded guilty to robbery arising out of this incident) had received a sentence of probation pursuant to his guilty plea. It was reasonably possible that the witness may have felt as though he was in a vulnerable position, whether real or imaginary, due to his status as a probationer, and such subtle pressure could have induced him to testify against defendant.

People v. Stout, 110 Ill.App.3d 830, 443 N.E.2d 19 (2d Dist. 1982) The judge erred by prohibiting defendant from cross-examining a State witness as to his pending criminal charges in another county, and the error was not harmless.

People v. Richmond, 84 Ill.App.3d 1017, 406 N.E.2d 135 (1st Dist. 1980) The trial judge erred by prohibiting the defense from asking a State eyewitness, on cross-examination, whether she knew of any outstanding warrants against her and if she had the hope of a reward for her testimony against defendant.

Cross-examination was not properly curtailed because in camera, the witness had denied knowing of the outstanding warrants. "The determination of whether she did in fact know of the warrants" or hoped for a reward was for the jury.

In finding the error prejudicial, the court stated that it was impossible to foretell how the witness would have stood up under cross-examination before the jury.

People v. Wheeler, 186 Ill.App.3d 422, 542 N.E.2d 524 (4th Dist. 1989) Though the trial court allowed defendant to cross-examine a State witness about a pending burglary charge, the court improperly precluded defendant from asking the witness the name of the charge. See also, **People v. Rufus**, 104 Ill.App.3d 467, 432 N.E.2d 1089 (1st Dist. 1982) ("the jury is entitled to know the nature of the pending charge in order that it will have before it complete information so as to be better able to resolve the bias question" and the seriousness of the charge is a factor the jury is entitled to weigh when assessing the witness's bias); **People v. Dace**, 182 Ill.App.3d 444, 538 N.E.2d 225 (3d Dist. 1989) (though defendant was allowed to ask two State witnesses whether they had been granted or promised leniency on their pending charges, defendant should have been allowed to question them as to what charges were pending to reveal their possible bias or motive). But see, **People v. Jodie**, 79 Ill.App.3d 348, 398 N.E.2d 595 (1st Dist. 1979) (where the judge allowed cross-examination about pending charges against a State witness and whether promises had been made in connection with them, the judge did not err by restricting the questions concerning the nature of the charges).

People v. Driskell, 213 Ill.App.3d 196, 571 N.E.2d 894 (4th Dist. 1991) Defendant, who was charged with unlawful delivery of cannabis, was entitled to cross-examine the informant, who set up the drug buy and who reportedly supplied drugs in an undercover buy the previous month but was not charged, and the officer who reported that the informant had supplied the drugs. Cross-examination regarding the alleged drug buy was relevant to whether the informant was biased in this case; the informant might well have believed that if he was "arrested or charged for the [prior] drug transaction . . . things might go better for [him] if the State was pleased with his testimony against defendant in this case."

That the informant had not yet been charged with the earlier offense did not preclude

cross-examination, "especially given that the decision whether to arrest or charge [the informant] resides unilaterally with the police and prosecution." Accord, **People v. Perez**, 209 Ill.App.3d 457, 568 N.E.2d 250 (1st Dist. 1991).

People v. Anthony Roy W., 324 Ill.App.3d 181, 754 N.E.2d 866 (3d Dist. 2001) Defense counsel was ineffective where he failed to present evidence that at the time of trial, the complainant was in State custody and facing charges. Because the pending charges provided a potential bias or motive to fabricate, counsel was mistaken when he assumed that the evidence was inadmissible.

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§57-6(b)(4)(h)
Juvenile Record

Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) The right of confrontation of witnesses is paramount to the State's interest in protecting the anonymity of a juvenile offender. Defendant was denied the right to confrontation where he was prohibited from cross-examining a key prosecution witness to show that the witness was on probation following an adjudication of juvenile delinquency. Defendant had the right to attempt to show that witness was biased and under undue pressure because of his vulnerable status as a probationer.

People v. Montgomery, 47 Ill.2d 510, 268 N.E.2d 695 (1971) A judge may allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the judge is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

People v. Norwood, 54 Ill.2d 253, 296 N.E.2d 852 (1973) The Juvenile Court Act does not bar disclosure of juvenile records when relevant to impeach a witness, by tending to show that the testimony "was attributable to lenient treatment which he had received or had been promised." See also, **People v. Triplett**, 108 Ill.2d 463, 485 N.E.2d 9 (1985) (the Juvenile Court Act does not preclude a defendant from using a juvenile's court records, even when the juvenile has not been adjudicated a delinquent, to impeach the credibility of the juvenile as a witness); **People v. Hamilton**, 17 Ill.App.3d 740, 308 N.E.2d 216 (4th Dist. 1974) (the trial court erred in precluding defense counsel from impeaching an accomplice witness with a record of a juvenile conviction).

People v. Harris, 231 Ill.2d 582, 901 N.E.2d 367 (2008) The trial court did not abuse its discretion by allowing defendant to be impeached with two juvenile adjudications, where the judge believed that defendant had attempted to mislead the jury about his criminal past when he testified that "I don't commit crimes." Because defendant "opened the door," impeachment with juvenile adjudications was proper.

Also, proof of a prior conviction is best accomplished through a certified copy, rather than cross-examination, even when the State seeks to impeach defendant's testimony on a specific point to which defendant has "opened the door."

People v. Newborn, 379 Ill.App.3d 240, 883 N.E.2d 603 (3d Dist. 2008) Under **Montgomery**, juvenile adjudications may be used to impeach a witness other than defendant, if a conviction for the same offense would be admissible to attack the credibility of an adult and the judge believes that impeachment is necessary for a fair determination of guilt and innocence. Factors to be considered in determining whether the proposed impeachment should be admitted should include the nature of the crime, the nearness or remoteness of the offense, the subsequent career of the witness, and whether the crime was similar to the one at trial. See also,

People v. Massie, 137 Ill.App.3d 723, 484 N.E.2d 1213 (2d Dist. 1985) (pursuant to **Montgomery**, adjudications of delinquency may not be introduced to impeach a defendant; the use of such adjudications is limited to the impeachment of a witness other than the accused); **People v. Kerns**, 229 Ill.App.3d 938, 595 N.E.2d 207 (4th Dist. 1992) (defendant's conviction reversed and remanded for a new trial where the State impeached defendant with juvenile adjudications).

Although the trial court's ruling on a question of impeachment is normally subject to the abuse of discretion standard of review, no deference to the court's decision is appropriate where the court fails to exercise discretion. Here, the court denied the impeachment not as an exercise of discretion, but because it believed that juvenile adjudications are inadmissible as a matter of law. The error was not harmless where, had the court exercised its discretion and allowed the impeachment, the jury would have learned of the witness's prior felony conduct and might have rejected his claim that defendant had been the shooter.

Cumulative Digest Case Summaries **§57-6(b)(4)(h)**

People v. Villa, 2011 IL 110777 (No. 110777, 12/1/11)

1. In **People v. Montgomery**, 47 Ill.2d 510, 268 N.E.2d 695 (1971), the Illinois Supreme Court adopted rules regulating the admission of prior convictions to impeach witnesses. Those rules included a provision that evidence of juvenile adjudications are generally not admissible, except in limited circumstances to impeach a witness other than an accused.

At the time of the adoption of the **Montgomery** rule, the Juvenile Court Act prohibited the admission of a juvenile adjudication against a minor except in subsequent proceedings under the Act concerning the same minor. Ill.Rev.Stat. 1965, Ch. 37, §702-9(1). The Act was subsequently amended to allow impeachment of a witness with a juvenile adjudication "pursuant to the rules of evidence for criminal trials," Ill.Rev.Stat. 1983, Ch. 37, §702-10(1)(c), which was interpreted to allow impeachment as provided by **Montgomery**. The Act now permits admission of juvenile adjudications for impeachment of witnesses "including the minor or defendant . . . pursuant to the rules of evidence for criminal trials." 705 ILCS 405/5-150(1)(c).

The Illinois Supreme Court found no conflict between §150(1)(c) and the **Montgomery** rule. Courts had interpreted the language "pursuant to the rules of evidence for criminal trials" in the Juvenile Court Act to incorporate the **Montgomery** rule. The legislature retained that language in the present statute, indicating that the present statute also incorporates **Montgomery**'s limitations. The statute's reference to a "minor or defendant" is not meaningless. It incorporates an existing case law exception to **Montgomery**, which allows introduction of a defendant's otherwise inadmissible criminal record where the defendant "opens the door" by attempting to mislead the trier of fact about his criminal background.

2. At trial, to explain why he falsely admitted guilt to the police, defendant testified that he was scared: "I've never been in a situation like this before. . . . they were saying that I was looking at prison time and stuff like that. I've never been in prison or nothing like that." Defendant admitted on cross-examination that he had given a typewritten statement to the police before, but testified that the situation was different because he had been 16 and was questioned as a juvenile.

The court concluded that defendant did not open the door to admission of his juvenile adjudication because he was not attempting to mislead the jury about his criminal background. At most, defendant's testimony implied that he had never been questioned by the police. Police questioning may occur in a variety of circumstances and is not necessarily indicative of a criminal background. Thus, defendant opened the door only to questioning about his prior experience with police questioning, not to his prior criminal history. Although defendant also stated he had never been in prison, this was a truthful statement.

3. The error was not harmless. Only defendant's statement to the police implicated him in the offense. Other evidence only proved his motive to commit the offense. The prosecutor made multiple references to the juvenile adjudication in argument to the jury, urging the jury that it supplied a basis to find defendant's testimony was not truthful.

(Defendant was represented by Assistant Deputy Defender Paul Glaser, Elgin.)

People v. Bond, 405 Ill.App.3d 499, 942 N.E.2d 585 (4th Dist. 2010)

Under **People v. Montgomery**, 47 Ill.2d 510, 268 N.E.2d 695 (1971), juvenile adjudications are inadmissible to impeach the accused in a criminal case. The court concluded that **Montgomery** remains the law in Illinois, and that 705 ILCS 405/5-150(1)(c), which provides that the defendant in criminal cases may be impeached with juvenile adjudications "pursuant to the rules of evidence for criminal trials," is consistent with **Montgomery** because it allows impeachment with juvenile adjudications only if permitted by the rules of evidence, which include the **Montgomery** doctrine.

The court rejected the holding of **People v. Villa**, ___ Ill.App.3d ___, 932 N.E.2d 90 (2d Dist. 2010) (No. 2-08-0928, 6/30/10) (appeal allowed 9/29/10 as No. 110777), which found that §5-150(1)(c) supplants the Supreme Court's decision in **Montgomery**. A statute which conflicts with a rule of evidence adopted by an Illinois Supreme Court decision is void under the separation of powers doctrine; "[w]here our supreme court has specifically directed the trial courts to follow a particular rule, the legislature is not free to direct the trial courts otherwise."

Because defendant was impeached with juvenile adjudications, **Montgomery** was violated. However, the court concluded that the error was harmless because in his testimony defendant admitted the only issue in dispute.

(Defendant was represented by Assistant Defender Janieen Tarrance, Springfield.)

People v. Rodriguez, 408 Ill.App.3d 782, 945 N.E.2d 666 (1st Dist. 2011)

A juvenile adjudication of delinquency may not be used to impeach a defendant. **People v. Montgomery**, 47 Ill.2d 510, 268 N.E.2d 695 (1971). When a defendant attempts to mislead the trier of fact about his criminal background, however, a court does not err in allowing a defendant to be impeached with a juvenile adjudication. **People v. Harris**, 231 Ill.2d 582, 901 N.E.2d 367 (2008).

Agreeing with the court in **People v. Villa**, 403 Ill.App.3d 309, 932 N.E.2d 90 (2d Dist. 2010), *leave to appeal allowed*, 237 Ill.2d 586, 938 N.E.2d 529 (2010), the First District construed **Harris** to permit a defendant to be impeached with a juvenile adjudication if he testifies in a manner that could reasonably be construed as an attempt to mislead the jury, even if the misleading statement does not concern the defendant's criminal background. The court found that it was not unreasonable to assume that defendant attempted to mislead the jury when he testified that a statement he made to the police inconsistent with his testimony at trial was a lie.

The court therefore found it unnecessary to address the conflict between the **Montgomery** rule and 705 ILCS 405/5-150(1)(c), which provides that a juvenile adjudication shall be admissible in a criminal proceeding to impeach any witness, including the defendant.

Robert Gordon, J., dissenting, read **Harris** to mean that a juvenile adjudication may be admitted only when the defendant attempts to mislead the jury about his criminal background. Interpreting **Harris** broadly to permit impeachment with a juvenile adjudication whenever a defendant attempts to mislead the jury about anything creates an exception that swallows the rule as the "State will always argue that the defendant was attempting to mislead the jury about something."

(Defendant was represented by Assistant Defender Brian Carroll, Chicago.)

People v. Villa, 403 Ill.App.3d 309, 932 N.E.2d 90 (2d Dist. 2010)

Noting a conflict in Appellate Court authority, the court held that although **People v. Montgomery** did not permit a defendant to be impeached with a prior juvenile adjudication, 705 ILCS 405/5-150(1)(c) explicitly permits such impeachment if the other requirements of **Montgomery** are satisfied.

(Defendant was represented by Assistant Defender Paul Glaser, Elgin.)

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§57-6(b)(4)(i)
Insinuations

People v. Enis, 139 Ill.2d 264, 564 N.E.2d 1155 (1990) It is error for the State to ask a defense witness questions presuming facts not in evidence as a precursor to impeaching the witness unless the State has admissible evidence to substantiate its inquiry. The asking and denial of a leading question carry a harmful innuendo that is unsupported by any evidence. The danger in such questioning is that the jury will ignore the denial and presume the accuracy of the impeaching insinuation contained in the question.

See also, **People v. Moore**, 54 Ill.2d 33, 294 N.E.2d 297 (1973) (if a witness is asked and denies making a prior inconsistent statement, the cross-examiner must offer evidence that such a statement was indeed made); **People v. Burbank**, 53 Ill.2d 261, 291 N.E.2d 161 (1972) (the same rule applies to a defendant's cross-examination of State witnesses); **People v. Robertson**, 198 Ill.App.3d 98, 555 N.E.2d 778 (2d Dist. 1990); **People v. Connor**, 176 Ill.App.3d 900, 531 N.E.2d 966 (1st Dist. 1988) (such tactics have no place in the search for truth, which is the object of cross-examination and a trial).

People v. Williams, 204 Ill.2d 191, 788 N.E.2d 1126 (2003) Generally, the State may not impeach a defense witness on cross-examination with a prior inconsistent statement unless it can prove the statement with extrinsic evidence. The State must have a good faith basis to ask impeaching questions on cross-examination, and both intent and ability to complete the impeachment.

Plain error occurred where the prosecutor cross-examined defendant with assertions that he had offered a defense witness (defendant's cellmate who ended up refusing to testify after speaking with the prosecutor before he was to testify) money and drugs to give false testimony, for defendant denied the allegations and the State failed to perfect the impeachment by calling the cellmate in rebuttal.

People v. Olinger, 112 Ill.2d 324, 493 N.E.2d 579 (1986) The State erroneously impeached a defense witness by asking her if she said she had used drugs on a certain date, a statement the witness denied making, where the State never perfected the impeachment and, in fact, admitted that the witness had never made the statement. The judge cured any prejudice by admonishing the jury that the witness had not made the statement and that the prosecutor had admitting making a mistake.

People v. Coates, 109 Ill.2d 431, 488 N.E.2d 247 (1985) During defendant's trial for child pornography and indecent liberties (the victim was his stepdaughter), the State did not err in allegedly making unsubstantiated insinuations on cross-examination of defendant that he battered his wife (who testified against him) and stepchildren and did not support them, which defendant denied. Defendant had insinuated on direct examination that his wife had fabricated the charges because of an argument about her failure to clean their apartment; the State's questions were "were properly directed toward probing the credibility of those insinuations."

People v. Braggs, 184 Ill.App.3d 756, 540 N.E.2d 767 (1st Dist. 1988) The State committed reversible error when, on cross-examination of a defense witness, the State asked, without any evidentiary support, whether the witness was present when defendant's mother offered the victim money to drop the charges and whether the witness was present at any point when defendant's mother talked to the victim. The witness said he did not know anything about that. The insinuation was not harmless, where it was not ambiguous and specifically implied that defendant's mother offered the complainant a monetary bribe.

People v. Brown, 170 Ill.App.3d 273, 524 N.E.2d 742 (2d Dist. 1988) The prosecutor's "veiled insinuation" that defendant uses cocaine, which defendant denied, was improper because there was no evidence that defendant used cocaine. See also, **People v. Davidson**, 235 Ill.App.3d 605, 601 N.E.2d 1146 (1st Dist. 1992) (defendant's convictions were reversed, in part, because of the prosecutor's unsupported insinuation that defendant used drugs shortly before the offense; the court rejected the State's claim that the insinuation benefitted defendant by making him appear more "mellow" and less likely to engage in a fight); **People v. Shipp**, 52 Ill.App.3d 470, 367 N.E.2d 966 (2d Dist. 1977) (the State erred in making the unsubstantiated assertion that defendant had shot someone on a previous occasion, which defendant denied).

People v. Williams, 333 Ill.App.3d 204, 775 N.E.2d 104 (1st Dist. 2002) The prosecutor committed plain err by cross-examining defendant by making unsupported insinuations concerning defendant's motives, and by repeating such assertions in closing argument. The State's unsubstantiated cross-examination and improper rebuttal argument (stating that paternity testing had determined defendant to be the child's father) "created a situation so fundamentally unfair and of such magnitude as to deny defendant a fair trial."

People v. Robertson, 198 Ill.App.3d 98, 555 N.E.2d 778 (2d Dist. 1990) The State erred when, on cross-examination of an alibi witness, it insinuated, without any evidentiary support, that the witness told an investigator certain things that conflicted with her testimony, which the witness denied. The State also erred where, on cross-examination of defendant, it asked defendant if he spent the night (on the relevant date) at the apartment of a man named Schroader and, after defendant said "yes," the prosecutor asked whether "if Schroader were to come into court and say that you didn't spend the night . . . that would be a lie." The State called Schroader in rebuttal, and Schroader said defendant did spend the night at his apartment (as defendant had testified). The prosecutor intimated but failed to perfect the impeachment.

People v. Morris, 79 Ill.App.3d 318, 398 N.E.2d 38 (1st Dist. 1979) It was improper for the prosecutor to cross-examine defendant about an alleged confession, which defendant denied making, and then fail to produce testimony in rebuttal that such a confession was made. See also, **People v. Strange**, 125 Ill.App.3d 43, 465 N.E.2d 616 (1st Dist. 1984) (the State committed reversible error on cross-examination by asking defendant whether had used an alias, and failing to present any supporting evidence after defendant denied doing so).

People v. Orr, 45 Ill.App.3d 660, 359 N.E.2d 1237 (3d Dist. 1977) The prosecutor committed reversible error by asking a defense witness about a certain prior statement the witness had allegedly made (that defendant did the shooting to fulfill a contract) and failing to offer proof of such a statement when the witness denied making it. The State's conduct was prejudicial because the alleged prior statement was the only potential evidence of a motive.

People v. Rivera, 145 Ill.App.3d 609, 495 N.E.2d 1088 (1st Dist. 1986) The State erred in insinuating that a key defense witness (who witnessed the shooting and said defendants were not one of the offenders) was a tool of the Latin King gang, of which defendants were members, by asking her whether her husband was a Latin King, whether he was associated with senior Latin Kings, and whether he had supplied drugs to Latin Kings, and by arguing these factors to the jury in closing argument. The State did not present any evidence to substantiate the implications. The only evidence remotely supportive was that the witness's husband had a prior drug conviction and the victim's sister had seen the husband with senior Latin Kings. But this evidence was insufficient to raise the inference that the husband was the gang's drug supplier or that he was a Latin King.

People v. Littlejohn, 144 Ill.App.3d 813, 494 N.E.2d 677 (1st Dist. 1986) Where an insanity defense was presented, reversible error occurred where the prosecutor implied in cross-examination and argument that

defendant had given "seminars on psychiatric disabilities." There was no evidence to indicate that defendant had taught such seminars; further, the cumulative effect of the cross-examination and closing argument denied defendant a fair trial.

Cumulative Digest Case Summaries **§57-6(b)(4)(i)**

People v. McCoy, 2016 IL App (1st) 130988 (No. 1-13-0988, 9/15/16)

1. It is improper for the State to question a witness for purposes of impeachment unless it is prepared to offer proof of the impeaching information. In other words, the State must possess a good-faith basis for cross-examination questions as well as the intent and ability to complete the impeachment.

At defendant's murder trial, the prosecution erred in cross-examining defendant where it asked whether defendant had threatened to kill the decedent's family if decedent said anything about defendant having been at the scene. There was nothing in the record to suggest that the State had the intent or ability to complete the impeachment by showing that defendant had made such a threat. Although the decedent made several statements to first responders before he died, there was no evidence to suggest that he told anyone that defendant threatened to kill his family. "In short, there was simply no evidence whatsoever to support the State's question."

The court concluded that the error was not harmless. Because there were no witnesses to the actual shooting and defendant offered an explanation for his presence in the decedent's car, the jury's verdict rested primarily on whether it found defendant's testimony to be credible. In addition, when defendant denied making the threat the State's Attorney implied that defendant was lying. The court also noted that the nature of the State's accusation "was so outrageous that it colored the entire trial."

2. A prior conviction is admissible to attack a witness's credibility where the prior crime: (1) was punishable by death or imprisonment of more than a year or involved dishonesty or a false statement, (2) was less than 10 years old or the witness was released from confinement within the last 10 years, and (3) has sufficient probative value to outweigh any danger of unfair prejudice. The trial court should consider, among other things, the nature of the prior conviction, the length of the witness's criminal record, the witness's age and circumstances, and the extent to which it is more important for the jury to hear defendant's story than to learn of a prior conviction. Although a prior conviction need not be excluded merely because it was for a similar crime to that for which the defendant is on trial, the trial court should be cautious in admitting such convictions.

Here, the trial court abused its discretion by admitting a prior attempt murder conviction at defendant's trial for murder. Not only was the prior conviction nearly identical to the crime charged, but in closing argument the prosecutor repeatedly encouraged the jury to focus on the prior conviction rather than the charge. Because the prejudicial effect of the prior conviction outweighed its probative value, admission of the evidence constituted error.

Defendant's conviction for murder was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Rebecca Cohen, Chicago.)

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§57-6(b)(5)
Defendant's Forfeiture by Wrongdoing of Right to Confrontation

Giles v. California, 128 S.Ct. 2678, 171 L.E.2d 488 (2008) The forfeiture by wrongdoing doctrine is limited to cases in which defendant acts with the intent to prevent the witness from testifying against him. See also, **In re Rolandis G.**, 232 Ill.2d 13, 902 N.E.2d600 (2008).

People v. Hampton, 406 Ill.App.3d 925, 941 N.E.2d 228 (1st Dist. 2010)

Admission of testimonial hearsay violates the accused's sixth amendment right to confrontation unless the declarant is unavailable and the accused had the earlier opportunity to cross-examine the declarant. **Crawford v. Washington**, 541 U.S. 36 (2004). One who obtains the absence of a witness by wrongdoing, however, forfeits the constitutional right to confrontation. To invoke this doctrine of forfeiture by wrongdoing, the State must prove by a preponderance of the evidence that the defendant intended by his actions to procure the absence of the witness. Any conduct by an accused intended to render a witness against him unavailable to testify is wrongful and may result in forfeiture of the accused's privilege to confront the witness. The doctrine also applies when defendant acquiesces in wrongdoing intended to procure the unavailability of the declarant as a witness. His active participation in the wrongdoing is not required.

At defendant's trial, the State called an alleged accomplice as a witness. The accomplice invoked his Fifth Amendment privilege when asked questions related to the offense and the court ultimately admitted the accomplice's prior statement pursuant to 725 ILCS 5/115-10.2 (admissibility of prior statements when witness refused to testify despite a court order to testify). On appeal, the State agreed that admission of the statement violated **Crawford**, but argued that the defendant forfeited his right to claim a violation of his right to confrontation because he wrongfully procured the silence of the witness. The Appellate Court remanded for a hearing on the claim of forfeiture by wrongdoing.

Following remand, the Appellate Court held that the State proved by a preponderance of the evidence that defendant engaged in conduct intended to render a witness unavailable to testify against him at trial. Defendant mailed a letter to the witness four days after defendant's trial began, informing the witness that he would be called to testify and repeatedly telling the witness to "plead the fifth." In the letter, the defendant directed the witness to call defendant's mother. Even though the witness did not receive the letter, the witness did call the defendant's mother and on multiple occasions she encouraged him to "plead the fifth," and coached him how to lie under oath at defendant's trial. The recorded conversations between the witness and the defendant's mother also supplied evidence that the witness was in communication with defendant about his being called as a witness. Because the record supported the trial court's finding that defendant and his mother engaged in a concerted effort to influence the witness not to testify, the Appellate Court concluded that it was not necessary for the State to show that the defendant was the actual cause of the decision of the witness not to testify.

(Defendant was represented by Assistant Defender Arianne Stein, Chicago.)

People v. Peterson, 2012 IL App (3d) 100514-B (No. 3-10-0514, 4/12/12)

1. 725 ILCS 5/115-10.6(a) provides that "[a] statement is not rendered inadmissible by the hearsay rule if it is offered against a party that has killed a declarant in violation of clauses (a)(1) and (a)(2) of Section 9-1 of the Criminal Code of 1961 intending to procure the unavailability of the declarant as a witness in a criminal or civil proceeding." The statute requires the circuit court to conduct a pretrial hearing to determine the admissibility of any statement offered pursuant to the statute at which the proponent of the evidence must establish by a preponderance of the evidence that: (1) the adverse party murdered the declarant and the murder was intended to cause the unavailability of the declarant as a witness; (2) the time, content and circumstances of the statement provide sufficient safeguards of reliability; and (3) the interests of justice will best be served by admission of the statement into evidence. 725 ILCS 5/115-10.6(e). The statute also provides that it does not change or preclude the application of the existing common-law doctrine of forfeiture by wrongdoing. 725 ILCS 5/115-10.6(g).

2. The common-law doctrine of forfeiture by wrongdoing, now codified as Illinois Rule of Evidence 804(b)(5), allows admission of a hearsay statement offered against a party that has engaged or acquiesced

in wrongdoing that was intended to and did procure the unavailability of the declarant as a witness, without any showing that the statement is reliable.

3. The Appellate Court concluded that §115-10.6 is in direct conflict with the common-law doctrine of forfeiture by wrongdoing because the statute requires a showing of reliability while the common-law doctrine does not. Because the Supreme Court has the ultimate authority to determine the manner by which evidence may be introduced into the courts, the conflict between the statute and the common-law doctrine must be resolved in favor of the common-law doctrine pronounced by the Supreme Court.

4. At the State's request, the circuit court conducted a hearing pursuant to §115-10.6 and found that the State had proved by a preponderance that defendant had murdered the declarants of statements that the State sought to admit, and that the defendant had done so with the intent to make the declarants unavailable as witnesses. After finding that the State had not satisfied its burden with respect to the reliability of the statements, the court refused to allow their admission. The court reasoned that the statute codified the common law and therefore took precedence over the common law.

5. A court's ruling on a motion *in limine* is typically reviewed for an abuse of discretion. Where a court's exercise of its discretion has been frustrated by an erroneous rule of law, however, review of the court's ruling is *de novo*. The circuit court's ruling on the admissibility of the statements was frustrated by the court's erroneous ruling that the statute supplanted the common law and was therefore erroneous as a matter of law. Because the court made the necessary factual findings for the admission of the statements under the common law codified as Rule 804(b)(5), the Appellate Court concluded that the excluded statements were admissible.

The Appellate Court reversed the circuit court's order and remanded for further proceedings.

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§57-6(c)
Redirect Examination

People v. Krueger, 99 Ill.App.2d 431, 241 N.E.2d 707 (1st Dist. 1968) Redirect examination is limited to new matters raised on cross-examination; a review of direct testimony is improper.

People v. Sanchez, 73 Ill.App.3d 607, 392 N.E.2d 378 (3d Dist. 1979) The scope of redirect examination is generally limited to the scope of cross-examination, and the allowance of any redirect beyond that is within the trial court's discretion. On redirect, a witness may be asked questions designed to remove unfavorable inferences or impressions raised by the cross-examination.

People v. Tingle, 279 Ill.App.3d 706, 665 N.E.2d 383 (1st Dist. 1996) Though a witness ordinarily cannot be asked on redirect examination whether his testimony is truthful, the trial judged erred by refusing to allow the defense to ask an alibi witness whether he was lying to help defendant where the State's cross-examination clearly implied that the witness was lying to help defendant and the prosecutor repeated that implication during closing argument.

People v. Hartness, 45 Ill.App.3d 129, 358 N.E.2d 954 (3d Dist. 1977) The court erred in prohibiting the defense from examining its witness on redirect, on the basis of a "rule of court," which did not permit "examination beyond re-cross in any trial," without addressing the nature of the examination and the facts and circumstances of the case.

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§57-7
Reopening a Case

People v. Castree, 311 Ill. 392, 143 N.E. 112 (1924) Trial court abused its discretion in allowing the State to reopen its case after closing arguments, where State gave no excuse or explanation for its failure to present the witness during trial.

People v. Figueroa, 308 Ill.App.3d 93, 719 N.E.2d 108 (1st Dist. 1999) Several factors should be considered in deciding whether to reopen the evidence, including whether the failure to introduce the evidence in a timely manner was inadvertent or a calculated risk, whether the adverse party will be surprised or unfairly prejudiced by the new evidence, whether the motion to reopen is timely, whether the evidence is of critical importance to the movant's case, and whether there are "the most cogent reasons to deny the request." Here, the failure to offer defendant's testimony during the defense case-in-chief was not inadvertent. However, the request to reopen was made before the instruction conference, closing arguments, or jury deliberations, and before any rebuttal evidence was offered by the State. Also, the State would not have been prejudiced had the case been reopened. Finally, the testimony was of utmost importance to defendant's case. Thus, the court abused its discretion by denying defendant's request to reopen the case.

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